

Stopping Genocide, a Mission Impossible?

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<p>Second World War and the subsequent Nuremberg Trial and national prosecutions against those responsible for the horrendous crimes left its mark to the history of international law. The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) was adopted not long after the Nuremberg legacy and was applauded with loud cheers of “Never again!”, which is still today embedded to Articles of the Genocide Convention. However, recent atrocities in Yugoslavia and Rwanda, and now in Myanmar, have turned the “Never again” into “Yet again?”.</p> <p>Although the crisis in Myanmar has been a concurrent theme in the UN organs though the years, the crisis is still today unsolved. Currently, there are approximately 1,000,000 refugees in neighbouring state Bangladesh, and the Fact-Finding Mission, established by the Human Rights Council, estimated in its Report that up to 10,000 deaths have taken place in the violence against the Muslim Rohingya.</p> <p>Rohingya is an ethno-religious term defining Muslim people residing in the borderline area of Arakan or Rakhine State in Western Myanmar. The Rohingya have been under persecution several decades. First large-scale campaign against them was launched in 1978 and it continued when the military junta in Myanmar (then Burma) passed the 1982 Citizenship Law, pursuant to which the Rohingya became, <i>de facto</i>, stateless. More recent violence that started in 2017 have led to numerous attacks, where villages were destroyed, mass arsons committed, men and boys killed, and woman and girls raped. This has been all conducted by the military and security forces of Myanmar.</p> <p>The Genocide Convention contains an obligation under which the states have an obligation to prevent and punish genocide. Since the atrocities of the 1990's, the establishment of the <i>ad hoc</i> tribunals the ICTY and the ICTR, the establishment of ICC and the much-debated judgement of the ICJ relating to the Balkan genocide, the development of international criminal law has accelerated from the early days of the Genocide Convention. Different kinds of early warning signs to mass atrocities have been recognized, doctrine of Responsibility to Protect (R2P) has been established, and the paths to judicial tribunals have emerged both for the individual liability of the perpetrators and state responsibility. This has not, however, stopped genocide from happening.</p> <p>A closer look will reveal that no matter from what corner the crime of genocide is examined or viewed, politics are there. The governments of states seem to avoid using the term genocide to a certain point, mostly for the fear that it would invoke obligations to prevent and protect. Also, the Genocide Convention does not entail any operational dimension as regards to what measures are considered preventive. When examining the R2P and its content as regards to more coercive measures, the UN Security Council is in charge of authorization of any action. This means that the power is, ultimately, on the permanent members of the UN Security Council through their veto rights.</p> <p>Punishment has a preventive effect, as well, because of its element of deterrence. However, this means that the perpetrators must be brought to court effectively. Any non-ratification, or non-party status to the ICC, alongside with reservations made to Article IX of the Genocide Convention creates problems with the aspect of punishment.</p> <p>This Thesis will examine the above-mentioned issues in more detailed way by systemizing the legal framework relating to genocide and studying the reasons that affect to the prevention of genocide in a debilitating way. All in all, it is unbearable both for the victims and the international community if no action is being made, as it sends the message to the perpetrators that everything is allowed. That will lead to the situation, where stopping genocide is impossible.</p>		
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ABBREVIATIONS

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
<i>et seq.</i>	<i>et sequa</i>
ICC	International Criminal Court
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
NATO	North Atlantic Treaty Organization
OHCHR	Office of the High Commissioner for Human Rights
para. / paras.	paragraph / paragraphs
p. / pp.	page / pages
UN	United Nations
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNOCI	United Nations Operation in Côte d'Ivoire
VCLT	Vienna Convention of the Law of the Treaties

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1 INTRODUCTION

*“[I]f we do not record and learn the bitter lessons of the past we are condemned to repeat our mistakes.”*¹

Second World War and the subsequent Nuremberg trial and national prosecutions against those responsible for the horrendous crimes left its mark to the history of international law.² The concept of genocide, meaning the intentional killing, destruction or extermination of groups or members of a group, was first conceived of as a category of crimes against humanity. The crime acquired autonomous significance as a specific crime in 1948 when the Convention on the Prevention and Punishment of the Crime of Genocide³ was adopted by the United Nations’ General Assembly. The Genocide Convention entered into force in 1951⁴ and was applauded by the international community with loud cheers of “Never again!”. The “*odious scourge*”⁵ had to be destroyed.

The Genocide Convention had its 70th birthday in December 2018. Since the Nuremberg trial, the international community has adapted slowly but solidly a consensus on the legitimacy of the Nuremberg Principles⁶, the applicability of universal jurisdiction to international crimes and the need to punish those who are in breach with their international obligations. The phrase “Never again!” is still today embedded to the Articles of the Genocide Convention. However, the recent atrocities in the former Yugoslavia and Rwanda, and in Kosovo and Darfur have shocked the conscience of the international community. And now, with the crisis of Rohingya, it seems that “Never again!” has become “Yet again?” and very little has been done by the UN and its member states in response, although Myanmar has been a concurrent theme in the UN organs.⁷

Rohingya is an ethno-religious term defining Muslim people residing in the borderline area of Arakan or Rakhine State in Western Myanmar (formerly Burma). From the beginning of

¹ This was stated by M. Cherif Bassiouni when paraphrasing the philosopher George Santayana in the context of describing the international justice system and atrocities taken place in the history. See Bassiouni 1997, p. 62.

² Shany 2009, pp. 16-18.

³ The Convention on the Prevention and Punishment of the Crime of Genocide will be hereinafter referred to as Genocide Convention.

⁴ A/RES/96/1.

⁵ Wording of the Genocide Convention, Preamble.

⁶ ILC Nuremberg Principles 1950.

⁷ The OHCHR keeps a record of the most recent reports concerning the situation in Myanmar. See <https://www.ohchr.org/en/countries/asiaregion/pages/mmindex.aspx>. Last visited: 18 December 2018.

August 2017 more than 700,000 out of 1,000,000 Muslim minority Rohingya people from Rakhine State of Myanmar have fled their homes to the neighboring country Bangladesh.⁸ The number of refugees is still growing, and the international community is facing one of the biggest humanitarian crises of all times.

The conflict in Myanmar is not, however, new. The roots of the conflict escalating today date back to 1978 when first large-scale campaign against Rohingya was launched and to 1982 when the military junta in Myanmar (then Burma) passed the 1982 Citizenship Law and the Rohingya lost their citizenship and became stateless considered to be illegal immigrants in their own country.⁹ The Rohingya have been faced with persecution and violence ever since, and the situation escalated in 2017 in the aftermath of the attack of Rohingya militants against police posts and military base, after which the Buddhist militia launched a “clearance operation”. Numerous large-scale attacks on Rohingya villages have been made and those attacks have included serious atrocities, including massacres, rape and mass arson, by the Myanmar military and security forces.¹⁰

The Human Rights Council established the Independent International Fact-Finding Mission on Myanmar¹¹ by its resolution on 24 March 2017¹² to examine the infringements of fundamentals of international law. After numerous interviews with victims and eyewitnesses from different ethnic and religious backgrounds, non-state organizations and former officials of Myanmar state institutions, travels to the neighboring countries, visits to the refugee camps and several field-missions, the Fact-Finding Mission established that serious human rights and humanitarian law violations and abuses had been conducted consistently by the Myanmar military. These violations have been committed to with such policies, tactics and conduct, which deliberately target civilians, and in the view of the Fact-Finding Mission amount to genocide. According to the Report, an estimated 10,000 Rohingya have been killed during the violence.¹³

⁸ Channel NewsAsia October 2018.

⁹ Zarni & Cowley 2014, p. 683.

¹⁰ A/HRC/39/CRP.2, Summary.

¹¹ The Independent International Fact-Finding Mission on Myanmar shall be hereinafter referred to as the “Fact-Finding Mission”. The main findings and recommendations of the Fact-Finding Mission are contained in UN document A/HRC/39/64. The document A/HRC/39/CRP.2 contains full factual and legal analysis, and broader recommendations.

¹² A/HRC/RES/34/22, para. 11.

¹³ A/HRC/39/CRP.2, Summary.

Article I of the Genocide Convention states that the contracting parties confirm that genocide, whether committed in time of peace or war, is a crime under international law, which they undertake to prevent and to punish. It seems though, as Smith aptly describes, that the phrase “Never again!” has more of an ironic echo than that of redemption.¹⁴ The representative of United Kingdom recently stated to the UN Security Council that the events in Myanmar resemble those in Rwanda and Srebrenica some twenty years ago and although the genocides there, “*to our lasting shame*”, could not be prevented then, at least then responsible ones were brought in front of the judicial bodies.¹⁵

The Genocide Convention has been criticized of being very weak by being merely an invitation to states to prevent and punish genocide but “binding no one to anything”.¹⁶ It is indeed true, that by the words of the Genocide Convention, the clear bearer of obligation to prevent is the territorial state, who, in the most cases, has orchestrated the genocide in the first place. To cite Shue, “[w]orse than putting the fox to guard the chicken coop, this is putting the fox in charge of apprehending and punishing chicken-killing foxes.”¹⁷

The doctrine of Responsibility to Protect (R2P) was introduced to the world in 2005 with the idea that sovereign states have a responsibility to protect their citizens from atrocities, which responsibility is conferred to the international community in case of a failure to act upon it. The R2P was designed to stop future Srebrenicas and Rwandas to happen.¹⁸ As it can be seen, it has not been the case as the Rohingya crisis stays unsolved still today.

The concrete acts and reactions on the part of the international community preceding the report of the Fact-Finding Mission have been avoiding the notion of genocide. Over the years, the UN organizations have defined in its documents the Rohingya crisis mainly as ‘human rights violations that may entail categories of crimes against humanity¹⁹’ and ‘textbook example of ethnic cleansing’. Word ‘genocide’ was not introduced until the Fact-Finding Mission’s report was publicized. During the years, the media has, however, been louder in its arguments.²⁰

¹⁴ Smith 2010, p. 1.

¹⁵ Statement by the Ambassador of the United Kingdom 2018.

¹⁶ Shue 2004, p. 19.

¹⁷ Shue 2004, p. 19.

¹⁸ Stahn 2007, p. 99-100.

¹⁹ A/HRC/13/48, para. 121.

²⁰ See, for example, The Globe and Mail 2017.

All of the above is in the juxtaposition of what is considered to be as aim of the international criminal law. An attack against fundamental values, such as peace, security and well-being of the world, gives genocide an international element that affects the whole international community. Leading to that, preventing genocide should be a primary focus of the international community.²¹

The main question of this Thesis is, is stopping genocide a mission impossible? As the international community is in the middle of the human rights crisis in Myanmar, the question is of great relevancy. How is it possible that the world is facing yet another genocidal crisis? To answer to these questions, this Thesis will examine and systematize the legal framework relating to genocide and study the reasons that affect to the prevention of genocide in a debilitating way. Although the Genocide Convention²² only brings up the prevention and punishment of genocide as the obligations of the states, this Thesis is construed into four separate issues that have been put in an imaginary time line: naming genocide, prevention of genocide, responsibility to protect and punishing of genocide. These are all separate, but intertwined, issues that represent also different phases of genocide. The Rohingya case will be carried along this Thesis, where relevant.

Firstly, from the nature of crime it can be concluded that genocide does not happen overnight. The root causes for genocide are complex and generated over time, or several decades, as in the case of the Rohingya. However, some reasons to the question, why genocide does not enjoy the status of “crime of crimes” in reality, can also be found from the behavior of the international community. Secondly, it is the obligation of the states to prevent genocide, identify the root causes and mitigate them. Thirdly, the R2P, put in the imaginary timeline, represents the obligation of the states to protect their population. In this Thesis, the R2P is set apart from the obligation to prevent, although they have certain similarities. This is to focus more on the possible use of force by the military, when the prevention in its conventional form is not possible any more. Fourthly, in order to mirror the aftermath of genocide, this Thesis deals with the question of punishment. At this point and context, it is acknowledged that the R2P, for example, includes a concept of rebuilding but due to the space limits, rebuilding²³ is excluded from the scope of this Thesis.

²¹ Advisory Opinion, Reservations to Genocide Convention (28 May 1951), p. 23.

²² Genocide Convention, Article I.

²³ As regards to rebuilding, see for example, Evans 2008, pp. 148-174.

Chapter 2 of this Thesis functions as a second introduction to the matter, as it goes through the Rohingya crisis. The history of the crisis, the political situation of Myanmar, and the events in the recent years are summarized, with acknowledgement that the summary may not do justice to the quantity and grade of all crimes that the Rohingya have been facing through their history. The facts stated in this Thesis are founded on the report of the Fact-Finding Mission, which contains more detailed description of the events and background of the crisis.²⁴ It is also pointed out, in this context, that this Thesis will not aim at considering or evidencing if the facts presented by the report of the Fact-Finding Mission amount in genocide before the courts. This will be left to the judicial bodies. Rather, this Chapter will establish that genocide is indeed a “slow-burning”²⁵ process. Also, Chapter 2 will briefly go through the reactions of the international community towards the events in Myanmar. This is to establish a view, where the international community stands as regards to the Rohingya crisis.

Before targeting the obligation of prevention of genocide, it is important to understand the phenomena genocide behind this need to prevent. Therefore, Chapter 3 of this Thesis will view the crime of genocide and its elements, the status of the crime under and outside the Genocide Convention and its relationship to ethnic cleansing. Further, it will be examined how the states use the word “genocide” and why so strong imperative as prevention of genocide remains, for the most part, rhetorical obligation.

Chapter 4 is dedicated to the prevention of genocide. This Chapter will examine what are the implications of Article I of the Genocide Convention as regards to obligation to prevent. Further, it will be studied which parties are obligated to prevent and what are the concrete acts or steps which the international community have taken or can take towards prevention?

The R2P doctrine demanded from the individual states, and the international community as well, a genuine commitment to employ a range of root-cause of prevention efforts from diplomatic means to military intervention that would tackle and halt the atrocities in the future. The reasoning for the R2P doctrine was to provide a framework the increasingly important element of human security, through protection via different means of intervention. Chapter 5 of this Thesis will go through the purpose, legal significance and the relevance of

²⁴ See A/HRC/39/CRP.2. The violations in Myanmar have taken place in various areas, this Thesis will only concentrate to those in the Arakan or Rakhine State area.

²⁵ Zarni & Cowley 2014, p. 1.

R2P in relation to preventing genocide. Does the much-valued doctrine bring any relieve to the prevention of genocide?

Then, finally, the questions relating to punishment are being examined in Chapter 6. This Chapter aims to answer to the following questions: what kind of role punishment has in the prevention of genocide, what are the available paths to punish the perpetrators and what are the challenges relating to punishment? On the basis of the previous Chapters, concluding remarks will be established in Chapter 7 of this Thesis.

Main arguments of this Thesis are that although the status of the crime of genocide is well established, it still is a politicized term. It should be emphasized more that genocide is a crime against the international community, not a domestic problem. Further, taking into consideration the nature of the crime, too much has been left to the hands of the territorial state. The preventive measures established do not seem to be effective. More weight should be given to R2P and the more coercive means therein. In addition, even though we have more judicial bodies to bring the perpetrators into justice, the international community should aim more for ratifying the statutes of the court, without reservations. As we have a dual system for both individual and state responsibility, the international community should pursue the effective use of it. Also, the UN Security Council should act more effectively.

To conclude this introduction, it is noted, that the issue of preventing genocide is very complex due to the nature of the crime. This Thesis is not aiming to be conclusive, it aims to raise issues that are most material. It is also acknowledged that this Thesis is repetitive in many aspects, due to the different elements being intertwined.

2 THE ROHINGYA CRISIS

*“How can it be ethnic cleansing? They are not an ethnic group.”*²⁶

2.1 Background to the Rohingya crisis

Even though the crisis concerning Rohingya has been brought to world’s attention more widely during the last few years, their history as targeted minority has long roots. To understand fully the amount and nature of the persecution that the Rohingya have faced, a short overview on the history is in order.

Myanmar (formerly Burma) is situated in Southeast Asia and shares borders with India and Bangladesh in west, Thailand and Laos in east and China in north and northeast. The Rohingya population is residing in the borderline area of Arakan or Rakhine State in Western Myanmar. The ancestral and cultural roots of the Rohingya lie along the post-colonial borders of today’s Myanmar, former British colony until the independence in 1948, and Bangladesh (former East Pakistan), which gained independency in 1971.²⁷

Even the centuries before the British colonial rule, the Rakhine area was full of multi-ethnic and multi-faith people. Regardless of the evidence that the Rohingya have populated the Rakhine area for ages, majority of the population in Myanmar claims that the Rakhine State is a home for the dominant majority group, the Rakhine Buddhists, not Muslim Rohingya. The Buddhists have manifested that they have been, and are, in danger both demographically and economically because of the Rohingya. The Rohingya have been called as illegal immigrants, Bengalis²⁸, who should be expelled from Burma.²⁹

In the early days of independence of Burma, the Rohingya were recognized as an ethnolinguistic group with a right to have a homeland. Since 1962, as the military claimed the power in Myanmar, the status of the Rohingya has been erased slowly by the anti-Muslim

²⁶ This was allegedly stated by Mr. Win Myaing, the official spokesperson of the Rakhine State Government on 15 May 2013, cited by Reuters, available at: <https://www.reuters.com/article/us-myanmar-rohingya-specialreport/special-report-in-myanmar-apartheid-tactics-against-minority-muslims-idUSBRE94E00020130515>.

²⁷ See Zarni & Cowley 2014, pp. 684-691.

²⁸ The term ‘Bengali’ refers to the immigration of people to the Rakhine area from East Bengal in the British colonial era. The Rakhine area borders with the sub-continent of East-Bengal, which later became East Pakistan after the partition of India in 1947 and, since 1971, the independent state of Bangladesh. ‘Bengali’ is considered to be a racist term implying illegal immigrant status. See also A/HCR/39/CRP.2, para. 460.

²⁹ A/HRC/39/CRP.2; Zarni & Cowley 2014, p. 685.

military-controlled governments. The first large-scale operation, which was the first wave of the ethnic cleansing, started in 1978 with the pursuit to separate nationals from non-nationals pursuant to a military rule. Rohingyas were accused to be illegal immigrants from Bangladesh and were detained, tortured and violently abused because of that. The Rohingya were also forced to hand over their National Registration Cards (NCR) to state actors³⁰. This led to a situation where 200,000 Rohingya fled to Bangladesh. It was the bilateral agreements between Bangladesh and Burma, that enabled the Rohingya, however, to repatriate back at that time.³¹

The repatriation had, however, its consequences. As a counteract, the 1982 Citizenship Act³² was legislated. The 1982 Citizenship Act was pivotal for the Rohingya as it defined 135 ethnic groups which were acknowledged in Myanmar. Even though the 1982 Citizenship Act as itself did not have any reference to the exclusion of the Rohingya, it was the acts of the state that *de facto* led to that outcome and denial of full citizenship in Myanmar.³³ Any individual not having the full citizenship were to acquire nationality through different application procedures with high criteria. General Ne Win also declared that no such individual had a right to any position in Myanmar's governance or armed forces. Further, pursuant to the 1982 Citizenship Act, the Rohingya have been under restrictions to travel, marry, educate themselves or have healthcare. Although the Rohingya was not the only minority excluded from the right to citizenship and access to positions, it quickly became the primary victim of discrimination and persecution.³⁴ Still today, the military forces seem to claim that Rohingya belong in Bangladesh and therefore, they must accept scrutiny under the 1982 Citizenship Act.³⁵

The wide-scale violations and forced migrations to Bangladesh continued several times in the 1990's, and in 2001 and 2012. Even though the political and economic atmosphere in Myanmar changed in 2010 and opened more open freedom to media, it did not change the position of the Rohingya. The government of Myanmar increased the military presence in

³⁰ The report of the Fact-Finding Mission establishes that NCR's were confiscated or teared. See A/HRC/39/CRP.2, para. 100.

³¹ A/HRC/39/CRP.2, par. 475.

³² 1982 Citizenship Act.

³³ According to Constitution of Myanmar, every citizen shall enjoy the rights to equality, liberty and justice and shall not be discriminated based on, *inter alia*, race, birth, religion and culture. Therefore, Rohingya, being stateless, are excluded from basic human rights protection. See A/HRC/39/CRP.2, paras. 66-68 and paras. 477-479; 2008 Constitution, Sections 21 and 348.

³⁴ A/HRC/39/CRP.2, para 477.

³⁵ According to Channel NewsAsia, this was stated by Commander-in-Chief, Min Aung Hlaing in September 2018. See Channel NewsAsia October 2018.

the borders of Rakhine State to minimize the external support to the Rohingya. The government of Myanmar, international community and even some of the UN agencies, continued to describe the violence as communal and sectarian.³⁶ Ever since, the Rohingya people have been under state-level plans, which aim to suppress and destroy the population. In 2013 the UN described the Rohingya as one of the most persecuted minorities in the world.³⁷

2.2 Political status of Myanmar

When examining the situation in Myanmar, strong military domination in the politics of the state stands out. An all-powerful military ‘*Tatmadaw*’ has ruled the country for most of its existence. Myanmar (then Burma) was a parliamentary democracy until the military takeover by General Ne Win in 1962, but even before that, the military had its influence on the government. Under the lead of Ne Win, the military used its control over the country claiming that it was necessary for the territorial integrity of the country against, *inter alia*, ethnic armed organizations³⁸. Following the takeover by Ne Win, a regime with restrictions on political activities, suppression of ethnic rebellions and arrests of political opponents was established. Even today, the military uses national sovereignty and territorial integrity as an excuse for its actions to suppress ethnic minorities³⁹.

Aung San Suu Kyi has long appeared as a voice of hope and democracy for Myanmar as a head of political party of National League for Democracy (NLD). Her prominence built up during the general strikes, which ultimately led to the resignation of the General Ne Win and replacement of the old military regime. However, she was placed under house arrest in 1989. This did not, however, prevent the NLD from gaining 60 per cent of the popular vote in the general election of 1990, the military junta with tight control held up. Those NLD representatives who had been elected to the parliament were either arrested or fled⁴⁰. That is

³⁶ See Zarni & Cowley 2014.

³⁷ See, for example,

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22491&LangID=E>.

Last visited: 18 December 2018.

³⁸ ‘Ethnic armed organizations’ is a term referring to non-state armed groups operating in northern and eastern part of Myanmar for maintaining political opposition to the State.

³⁹ See Zarni & Cowley 2014.

⁴⁰ For more detailed description, see, for example, A/53/364, para. 16 *et seq.*

the reason why, throughout the 1990s, Western world imposed strong sanctions against Myanmar, which led to the notable rise of cost of basic commodities.

In 2010, when the military-backed Union Solidarity and Development Party (USDP), General Thein Sein, the leader of the USDP, became President. His government started to implement number of reforms, including freeing most political prisoners and reducing censorship a restriction on the media. After liberalization, also Aung San Suu Kyi was released from the house arrest and the Western world gave up the sanctions and increased foreign investments.⁴¹ Alongside economical wealth, this generated international goodwill to Myanmar in its steps towards democratization.

Democratization and respect of human rights has been long due for Myanmar and it has been a country of concern of the UN since the protests in 1988 and general elections in 1990. The General Assembly of the UN adopted its first resolution on the situation in Myanmar in 1991 and that substantive available information indicated grave breaches of human rights.⁴² After that, similar resolutions have been adopted through the years. The Commission of Human Rights has stated that there had not been any apparent progress in giving effect to the political will of the people of Myanmar and created a mandate of Special Rapporteur on the human rights situation in 1992⁴³. All three following Special Rapporteurs up today have repeated the concern. Current Special Rapporteur Tomas Ojea Quintana pointed out in 2010 that gross and systemic nature of human rights violations in Myanmar have taken place for many years and that the lack of accountability of Myanmar is an indicator that these violations are a result of state policy, which involves authorities at all military and judicial levels.⁴⁴

2.3 Years 2017-2018

In late 2015, an ethnic Rakhine armed group called ARSA, started to operate in the Rakhine State. The aim of the ARSA was to gain self-determination for ethnic Rakhine people and safekeep their cultural heritage and national dignity. In the years that followed, the ARSA had encounters with the Tatmadaw forces, and they became gradually deadlier. However,

⁴¹ According to World Bank sources of the report of the Mission, foreign investments more than tripled from USD 901 million in 2010 to USD 3,2 billion in 2016. A/HRC/39/CRP.2, paras. 77-79.

⁴² A/RES/46/132.

⁴³ E/CN.4/RES/1992/58. The Commission of Human Rights expressly cited the Universal Declaration of Human Rights: “the will of the people shall be the basis of the authority of government.”

⁴⁴ A/HRC/13/48, para. 121.

according to the report of the Fact-finding Mission, the acts of the military forces always exceeded those of the ARSA.⁴⁵

25 August 2017 and the following days mark the starting point of the events that escalated into the situation what we know today. On 25 August, the ARSA launched coordinated attacks on the military base and outposts of security force across the northern Rakhine State as to response to the increased pressure on the Rohingya population and with a goal to gain international attention. According to the report to the Fact-finding Mission, the ARSA had small number of arms, untrained villagers fought with sticks and knives and some had improvised explosive devices. Twelve security personnel were killed by the attacks.⁴⁶

The response of the security and military forces of Myanmar was operated within hours against the Rohingya, with brutal and clearly disproportionate means. By 5 September 2017, 40 per cent of the villages in Northern Rakhine State were partially or destroyed, and the attacks resulted in escapes of 725,000 Rohingya people to Bangladesh.⁴⁷ This number is growing still today.

2.4 Reactions of the international community to the Rohingya crisis

2.4.1 Myanmar

Myanmar is party to a multiple international treaties and conventions, in relation which it is in breach. First, Myanmar is bound by the UN Charter and is therefore committed to act for the achievement of “*universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion*”.⁴⁸ Alongside the Genocide Convention, Myanmar is also a party to the four Geneva Conventions of 12 August 1949, which Article 3 includes protection of civilians and other persons not being directly a part of the hostilities, and other international treaties under which it has obligations towards

⁴⁵ A/HRC/39/CRP.2, para. 408.

⁴⁶ A/HRC/39/CRP.2, para. 750.

⁴⁷ A/HRC/39/CRP.2, para. 751. The report of the Fact-finding Mission refers to a Facebook post of Commander-in-Chief, Senior-General Min Aung Hlaing, who had stated in the heat of the clearance operation that “*The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of the previous governments to solve it. This government is taking great care in solving the problem.*” The link to said Facebook post has been later defuncted.

⁴⁸ UN Charter, Art. 55(c) and Art. 56.

its citizens and international community.⁴⁹ In the national level, the Constitution of Myanmar provides guarantees for human rights, such as right to equality and non-discrimination, the right to life and right to freedom, which means that citizens of Myanmar shall not be discriminated on the basis of race, birth, religion, official position, status, culture, sex and wealth.⁵⁰

However, as the Rohingya are *de facto* stateless, the 1982 Citizenship Act has acted as a legal base for all the discrimination and the Constitution does not secure their rights. The international community has numerous times expressed its view that the 1982 Citizenship Act should be reviewed and reformed so that the gaining of nationality would be non-discriminatory and not of racial issue. The response of Myanmar has been uncompromising, as the government believes the 1982 Citizenship Act is highly supported by the public opinion.⁵¹ All violence that has happened in Myanmar, has been executed with impunity on the side of the government.⁵²

In 2016, Myanmar responded to the concerns of the international community by forming an Advisory Commission on the Rakhine State. The Advisory Commission was composed of six national and three international members and chaired by the former UN Secretary-General, Kofi Annan. The mandate of the Advisory Commission was to find lasting solutions to the complex and delicate issues of the Rakhine State, in accordance with the international standards. The Myanmar government also formed a Central Committee for the Implementation of Peace and Development in Rakhine State, with the State Counsellor Aung San Suu Kyi as chairperson.⁵³

The Advisory Commission handed over its final report in August 2017 with its recommendations to the Myanmar government. The State Counsellor welcomed “*meaningful and long-term solutions*” but emphasized that the concerns of the international community show “*troubling signs of external interference aimed at aggravating an already difficult situation*”.⁵⁴

⁴⁹ For example, Myanmar is a party to Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination against Women, Convention on Economic, Social and Cultural Rights. See A/HRC/39/CRP.2, paras. 33 *et seq.*

⁵⁰ Constitution of Myanmar, Chapter VIII (Citizen, Fundamental Rights and Duties of the Citizens).

⁵¹ Zarni & Cowley 2014, p. 703.

⁵² A/HRC/39/CRP.2, para. 103.

⁵³ Advisory Commission Final Report 2017.

⁵⁴ Statement by the Office of the State Counsellor on the Advisory Commission Report, paras. 2-3.

A lot of the attention of the world has been directed to the State Counsellor, Aung San Suu Kyi. Her office has repeatedly either dismissed or underrated the allegations relating to the Rohingya crisis and put them into the categories of “fake rape”, “fake news” and “huge iceberg of misinformation”.⁵⁵ The former Nobel Peace Winner has since been called as democracy icon that has fell from grace.⁵⁶ Aung San Suu Kyi has commented that there are difficulties in Myanmar, but people should rather recognize and solve them than exaggerate them seem worse. She later stated that ethnic cleansing is a too strong term to use and used the term hostility between the parties.⁵⁷ The Fact-finding Mission concluded in the report that Aung San Suu Kyi had failed to use her position as a head of government, or her moral authority, to stem or prevent the Rohingya crisis.⁵⁸ What once were a beacon for universal human rights, is now considered to be something else.

The lack of cooperation from the side of the Myanmar government is a theme that recurs in the UN resolutions, OCHCR reports and in the report of the Fact-Finding Mission.⁵⁹ Myanmar has rejected all the findings of the Fact-Finding Mission. The UN Ambassador of Myanmar stated to the Security Council that they are willing and able to take on the accountability issues for any alleged human rights violations when there is sufficient evidence.⁶⁰ This means that the whole Report of the Fact-Finding Mission has been questioned by Myanmar.

2.4.2 UN

All the four Special Rapporteurs of the OCHCR have since 1992 concluded that the human rights violations in Myanmar have been widespread and systematic, followed a pattern and linked to state and its military policy.⁶¹ In 1998, the Special Rapporteur Rajs Moor Lallah gave an alarming description on the situation: “[t]he Special Rapporteur is deeply concerned about the serious human rights violations that continue to be committed by the armed forces in the ethnic minority areas. The violations include extrajudicial and arbitrary executions (not sparing women and children), rape, torture, inhuman treatment, forced labour and

⁵⁵ A/HRC/39/CRP.2, paras. 1339-1340. See also BBC (January 2018).

⁵⁶ BBC (September 2018).

⁵⁷ BBC (January 2018).

⁵⁸ A/HRC/39/CRP.2, para. 1548.

⁵⁹ A/53/364, para. 55; A/HRC/39/CRP.2, Summary, para. 3; E/CN.4/1999/35, para. 10.

⁶⁰ See, for example, <https://www.un.org/press/en/2018/sc13552.doc.htm>. Last visited: 18 December 2018.

⁶¹ A/53/364, para. 55; A/HRC/39/CRP.2, Summary, para. 3; E/CN.4/1999/35, para. 10.

*denial of freedom of movement. These violations have been so numerous and consistent over the past years as to suggest that they are not simply isolated or the acts of individual misbehavior by middle- and lower-rank officers but are rather the result of policy at the highest level, entailing political and legal responsibility.*⁶² Further, all the Special Rapporteurs have pointed out that in addition to these systematic violations, there is also a pattern of systematic impunity which creates an obstacle for the realization of human rights.⁶³

2.4.3 Others

The international community recognizes the Rohingya as an ethnic group. But for some parts, the Rohingya crisis has been labelled as communal violence.⁶⁴ This view is problematic, since if the crisis at hand is described as domestic, the international attention to it is of minor importance despite of how brutal the conflict may be. The imperative of crisis situations is the world's major powers' political will to act. It is unfortunate for the victims how politicians often allow intentionally time to pass so that the public interest and pressure is faded, and they are no longer obliged to act or ensure the success of, for example, investigative bodies.⁶⁵

For example, in the case of Yugoslavia, the political climate and nature of the crisis was in juxtaposition at first. However, the pursuit of justice woke up later as a response to international concerns and to brutal atrocities that the media brought up. In the case of the Rohingya, because the major powers have not wanted to have any intervention, so far neither the UN or EU had interest to actuate any mission to end the hostilities.⁶⁶

The Rohingya crisis has received large amount of visibility during recent years. The challenge is, like with any other crisis, to make sure that the issue is not forgotten. It requires ongoing attention from the media, ongoing research from organizations and ongoing monitoring from the UN agencies. The media attention can be, however, problematic in some cases. Schabas uses the definition "the genocide mystique" to describe a situation when states invoke genocide just to get attention, stir debate and excite the media. Perhaps, due to

⁶² A/53/364, para. 90.

⁶³ A/53/364, para. 51; E/CN.4/1995/35; A/HRC/39/CRP.2, para 1620.

⁶⁴ Zarni & Cowley 2014, pp. 688 *et seq.*

⁶⁵ Bassiouni 1997, pp. 11-12.

⁶⁶ Bassiouni 1997, pp. 40.

the situations where term genocide has been misused for demagogical purposes describing situations that have not been genocidal, the international community has since carefully placed its words and avoids using the term.⁶⁷

The Rohingya crisis indeed shows that violence that took place in 2017 is just a tip of an iceberg. There have been many opportunities for the international community to act but so far it has settled for solving the problem through UN diplomacy. It should be noted that however domestic or internal the conflict is (or is claimed to be), it is the scale and the nature of the crime of genocide that makes it very much an issue of international one. Foreign states are forced to have a role either by providing refuge, prosecuting them before their own jurisdiction or in facilitating the extradition of the accused.⁶⁸

3 NAMING GENOCIDE

“That day felt like the last day of this world, as if the whole world was collapsing. I thought judgment day had arrived.”⁶⁹

3.1 The Nuremberg legacy and the Genocide Convention

As can be concluded from the above citation, there is a true ring to it that genocide shocks the conscience of the mankind.⁷⁰ The victims have lost they human dignity and become prey to the perpetrators.⁷¹ Therefore, it is no wonder that genocide is often described as a crime of crimes and placed among the most heinous mass atrocities. The legacy of such status is very much rooted to the Nuremberg legacy as described next.

Still today, we remember the horrendous events of the Holocaust, where over 6,000,000 Jewish people were systematically attacked and killed. The spirit of “Never again” affected

⁶⁷ Schabas 2012, pp. 101-103.

⁶⁸ Reydamas 1996, p. 20.

⁶⁹ A/HRC/39/CRP.2, p. 179. The Report cites a victim heard while gathering evidence.

⁷⁰ Rome Statute, Preamble.

⁷¹ May cites one of the officials in the Rwandan gacaca court session that stated: “*Celui qui tuait ne voyait pas qu’il tuait un homme, il croyait tuer un animal suite aux leçons données par les autorités d’alors.*” To translate freely: “The one who kills, does not see a human, he kills an animal by the orders of the authorities”. See May 2010.

to the birth of the UN and to the Genocide Convention and even the international criminal tribunals of today have certain features of the International Military Tribunal.⁷²

The International Military Tribunal, or the Nuremberg Tribunal, was established in 1945 after the World War II. The subject-matter jurisdiction of the Nuremberg Tribunal entailed three categories of crimes: crimes against peace, war crimes and crimes against humanity.⁷³ What makes the Nuremberg Tribunal special and relevant even today, is that it held for the first time in the history the senior state officials who had committed crimes acting on behalf of or with the protection of their personally accountable. This showed an influential example, pursuant to which the crimes were not committed not just against the victims of the Holocaust but against the international community as a whole.⁷⁴ Understandably, after the Nuremberg trials, the atmosphere strongly pressured the efforts to further develop and refine international criminal law to ensure the criminal accountability of persons committing genocide. This marks the starting point for the birth of the Genocide Convention.⁷⁵

As can be seen from the abovementioned subject-matter jurisdiction of the Nuremberg Tribunal, it did not include genocide as a term. The term⁷⁶ was invented by a Polish lawyer, Raphael Lemkin, to describe the crimes committed by the Nazis. It meant the intentional killing, destruction or extermination of groups or members of a group, definition of which can be found also from the Genocide Convention, albeit in a longer form.⁷⁷

The crime of genocide was first defined and determined as crime under international law by UN General Assembly in 1946. The UN General Assembly authorized the UN Economic and Social Council to draft a proposal for the wording of the Genocide Convention with a group of experts, such as Lemkin.⁷⁸ The international community was ready to commit to the Articles as after few years of drafting and modification, so the draft of Genocide Convention was adopted unanimously by the General Assembly on 9 December 1948⁷⁹ and

⁷² Calvo-Goller 2006, pp. 9-10.

⁷³ Schabas 2009, p. 43.

⁷⁴ Drumbl 2007, p. 3.

⁷⁵ The Convention on the Prevention and Punishment of the Crime of Genocide will be referred hereinafter to as the “Genocide Convention” or the “Convention”.

⁷⁶ The word ‘genocide’ is formed from two foreign words; the Greek ‘*genos*’, for race, and Latin ‘*caedere*’, for killing. See for the background of the definition Smith 2010, pp. 21-22.

⁷⁷ Art. I of the Genocide Convention.

⁷⁸ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en. Last visited: 18 December 2018.

⁷⁹ A/RES/96(1); Werle & Jessberger 2014, p. 291-292.

it came into effect in 1951. Up to date, almost 150 states, including Myanmar, have ratified the Genocide Convention.⁸⁰

However, the purpose of the Genocide Convention, liberation of mankind from an “odious scourge”⁸¹, has not been fulfilled to its most. As we have witnessed, for example, by the Balkan and Rwandan genocide, the spirit of “Never again” has not held its place in terms of stopping genocide from taking place. This has not however changed the normative situation as regards to the Genocide Convention. It is still the only normative framework for genocide in its original form of 1948.

The world has changed a lot since World War II, and thus it is not a surprise that over the years, the content and formulation of the Genocide Convention has encountered a lot of criticism for its inadequacy.⁸² However, even though the Genocide Convention has stayed the same, the case law of the international tribunals has had a significant part on developing and specifying the content of the Genocide Convention. It was the judges of the ICTR that were the first ones to interpret and apply the legal definition of genocide in practice.⁸³ And subsequently, the ICTY and the ICJ have in turn contributed to the matter in their judgements concerning the Balkan genocide. It can be therefore concluded that some normative and institutive gaps of the Genocide Convention have therefore been fulfilled.

On the date of this Thesis, the Genocide Convention has reached its 67th birthday since entering into force. Even though the Convention is several decades old, the declaration in its preamble text is very much of today - genocide is inflicting great losses on humanity and the international community should act in cooperation in combating the crime.⁸⁴

⁸⁰ See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en. Last visited: 18 December 2018.

⁸¹ Genocide Convention, Preamble.

⁸² A lot of the criticism towards the Genocide Convention is related to the notion of protected groups and the exclusion of political ones. According to Schabas the four protected groups were drafted in the Genocide Convention because they represented best the groups that were targeted in the Holocaust. Schabas also raises the limited range of punishable acts of the Genocide Convention. See Schabas 2012, pp. 110-114. It has also been criticized that the Genocide Convention does not entail the issues relating to the state responsibility. See, for example, Shany 2007, p. 4.

⁸³ Statute of the ICTR. The ICTR’s jurisdiction covered the violations committed between 1 January 1994 and 31 December 1994.

⁸⁴ Genocide Convention, Preamble; Shany 2007, p. 11. Shany describes that the call for the cooperation of the states is the *raison d’être* of the Genocide Convention.

3.2 The legal concept of genocide

3.2.1 Definition of genocide

The definition of genocide is included to Article II of the Genocide Convention, which provides that:

“[i]n the present Convention genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;*
- (b) Causing serious bodily or mental harm to members of the group;*
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
- (d) Imposing measures intended to prevent births within the group;*
- (e) Forcibly transferring children of the group to another group.”⁸⁵*

Therefore, three considerations are required, when invoking genocide: whether the attacked group falls in the above-mentioned criteria of protected group, whether any acts described in Article II have been committed and whether the acts have been committed with special, genocidal intent.

At the first glance, the definition of genocide seems quite straightforward. Moreover so, as the list of genocidal acts enumerated therein is exhaustive. Other acts, no matter that they would be committed with intent to destroy a protected group, are not genocide. However, a closer examination will unveil that the definition bears some ambiguities and vagueness. As regards to the acts enumerated in Article II, such as killing and causing serious bodily or mental harm, the ICJ has considered that they cannot be interpreted isolated from the context of the purpose of the Genocide Convention – the prevention and punishment of genocide.⁸⁶ In addition to that, the ICJ has further interpreted, among other things, the following parts of Article: what is the meaning and scope of “destruction” of a group, what does destruction

⁸⁵ Genocide Convention, Article II.

⁸⁶ Genocide case (Judgement, 3 February 2015), para. 149.

of a group “in part” means, and what can be considered as evidence constituting special intent?⁸⁷ These are all fundamental questions and issues to which the Genocide Convention does not provide answers, but they are in the essence of determining whether or genocide has happened.

Concluding the existence of genocide by legal terms is not thus as easy as it may seem. One of the features, that makes genocide special compared to other mass atrocities, is the genocidal intent. Convictions for genocide can be entered only where the special intent has been unequivocally established.⁸⁸

3.2.2 The specific intent to destroy

Specific intent to destroy a national, ethnical, racial or religious group is the feature of genocide that distinguishes it from other mass atrocities and gives the crime its special character.⁸⁹ Therefore, the evidentiary considerations are the in the essence of defining the intent. However, the Rules of Evidence⁹⁰ of the international tribunals serve little detailed norms on the assessment of the evidence. As it has been established in the preceding paragraphs, the definition of genocide has been clarified by the international tribunals and the content of special intent is no exception. Therefore, a closer look to the case law is in order. The question is, how to prove that a perpetrator acted with the required specific intent?

Whether committing genocide requires always a genocidal policy has been a much-debated issue. There are views against and for it, and then there is also the view that holds that for some acts enumerated in Article II of the Genocide Convention systematic or widespread practice or plan is required and for some it is not.⁹¹ Cassese argues that first two genocidal acts enumerated in Article II, killing members of the group and causing serious bodily or mental harm to the members of the group, do not require a genocidal policy, although they

⁸⁷ Genocide case (Judgement, 3 February 2015), paras. 133-148. Jessberger has examined the acts enumerated in Article II of the Genocide and how the elements therein have been interpreted by the international tribunals. See Jessberger 2007, pp. 96-103.

⁸⁸ Prosecutor v. Krstic (19 April 2004), para. 134.

⁸⁹ Milanović 2006, p. 558.

⁹⁰ The ICC, the ICTY and the ICTR all have their own specific Rules of Procedure and Evidence by which they are bound.

⁹¹ See for example, Milanović 2006, p. 566 *et seq.*

are of then tolerated, approved or condoned by governments. The last three genocidal acts, however, require collective action.⁹²

In any case, evidencing the genocidal intent requires proof of framework, policy or plan within the accused has functioned. In the cases of international tribunals, claims against accused persons have always failed when the court has not been able to link the acts committed to a genocidal intent.⁹³ Acceptance or dismissal of certain evidence and/or distinctions in weighing the value of the evidence have therefore a direct effect on finding a perpetrator accountable. In addition, despite of a positive ruling, the reasonings for evidentiary statements may often be further examined in the appeals chambers of the tribunals. For example, in the case of *Zigiranyirazo*, the Trial Chamber of the ICTR convicted the defendant to 20 years of imprisonment for genocide, but he was later acquitted by the Appeals Chamber after having noticed errors in the Trial Chamber's assessment of evidence.⁹⁴

Behrens describes well the problem of evidencing specific intent. He states that the need for conclusive analysis of the evidentiary situation is particularly strong in cases where subjective perception lies at the heart of the matter. Nonetheless, the objective view has its own difficulties too. The eyewitnesses may be unreliable and documentary evidence may have room for interpretation. Without any statement by the victims, the courts are unable to assess the thought process of the perpetrator. However, sometimes even the eyewitnesses may not be enough to establish the specific intent.⁹⁵

A material situation arises if the court must decide if genocide has been committed, as was in the case in the *Genocide Case*.⁹⁶ When comparing the evidence of the acts enumerated in Article II of the Genocide Convention, the *actus reus* to *mens rea*, the special intent of the perpetrator, the *actus reus* is more easily proved. Simply put, causing serious bodily or mental harm or killing members of the group are more visible to the eye. The special intent to destroy, on the other hand, is not.⁹⁷

⁹² Cassese 2007, p. 129-135.

⁹³ Prosecutor v. Goran Jelusic (14 December 1999), para. 97; Werle & Jessberger 2014; p. 321.

⁹⁴ Prosecutor v. Zigiranyirazo (16 November 2009), para. 73.

⁹⁵ Behrens 2011, p. 663.

⁹⁶ Genocide Case (Judgement 26 February 2007), para. 1.

⁹⁷ Behrens 2011, p. 663.

For example, in the *Genocide Case*, the ICJ had the task of evaluating if genocide had taken place in Bosnia-Herzegovina. The court ruled, after following the ICTY's qualification⁹⁸ as regards to defining the protected group, that acts committed at Srebrenica would fall within Article II of the Genocide Convention and that there was a specific intent to destroy in part of the group of the Muslims of Bosnia and Herzegovina as such.⁹⁹ The genocide was, however limited just for the mass killings at Srebrenica, as the court could not establish the special intent for the other atrocities committed.¹⁰⁰ Also there the ICJ followed the ICTY, which was having similar problems to establish genocide beyond all reasonable doubt.¹⁰¹ The court was given a second chance to review the issue in 2015, but it reiterated the judgement of 2007.¹⁰²

The elements of genocide require that genocide is not just about the acts committed, it is the acts committed with intent to destroy, in whole or in part the targeted group. However, as the ICJ concluded, it is not enough that the members of the group are targeted because of the membership, but something more is required – intent to destroy should be significant enough to have an impact on the group as a whole.¹⁰³ This means, in the case of the Rohingya, that people were not being killed because they were Rohingya Muslims but because of the intent to destroy the Rohingya Muslims group as such.

The standard of proof what is required for proving genocide varies between the ICJ and other international tribunals. The Rules of the Court, as adopted by the ICJ, state that the method of handling evidence shall be settled by the court after assessing the view of the parties.¹⁰⁴ Depending on the case and its nature, the ICJ therefore reserves the right to adopt standards of proof that may vary. However, the ICJ has set up the standard of proof quite high. In the *Genocide* case the court stated that to prove genocide “*a high level of certainty appropriate to the seriousness of the allegation*” is needed.¹⁰⁵ The international tribunals, the ICTY, the

⁹⁸ Prosecutor v. Krstic (2 August 2001), para.560; Prosecutor v. Radislav Krstic (19 April 2004), para. 22.

⁹⁹ *Genocide* case (Judgement of 26 February 2007), paras. 296-297. The ICJ stated that it had no reasons to disagree with ICTY's Trial Chamber's and Appeals Chamber's findings.

¹⁰⁰ *Genocide* case (Judgement of 26 February 2007), para. 370.

¹⁰¹ Prosecutor v. Goran Jelusic (14 December 1999), paras. 106, 108.

¹⁰² *Genocide* case (Judgement of 3 February 2015), paras. 295, 360, 394 and 440.

¹⁰³ *Genocide* case (Judgement of 26 February 2007), paras. 187, 198.

¹⁰⁴ Rules of the Court 1978, Article 58.

¹⁰⁵ *Genocide* case (Judgement of 26 February 2007), para. 210.

ICTR and the ICC, have set the standard of proof to the level of “*beyond reasonable doubt*”, which is derived from the presumption of innocence.¹⁰⁶

To help the task of determination of genocide, the ICTR developed a method of deducing the specific intent from certain indicators. In the *Akayesu* case following indicators were introduced, among others:

- (i) general range of criminal acts systematically targeting the same group committed by the perpetrator;
- (ii) the scale and general nature of the acts committed in a region or country; and
- (iii) systematical and deliberate targeting of victims because of their membership to a group while excluding others.¹⁰⁷

In the *Kayishema and Ruzindana* case, the court referred to the *Akayesu* case and further elaborated the indicators to include, for example:

- (iv) physical targeting of the group or their property¹⁰⁸;
- (v) use of derogatory language towards the targeted group; and
- (vi) methodical way of planning, systematic manner of killing and number of victims.¹⁰⁹

The court also brought up the fact that the killings did not only target men, but also pregnant women, elderly and children was an indicator of the destruction of a group.¹¹⁰ The court however noted that the contextual indicators used to determine special intent should be, however, counterbalanced with the actual conduct and acts of the perpetrator.¹¹¹ Therefore, the acts of genocide should correspond the special intent.

¹⁰⁶ Rome Statute, Article 66; ICTY RPE, Rule 87 (A) and ICTR RPE, Rule 87 (A). Article 66 of the Rome Statute declares that everyone shall be presumed innocent until proved guilty before the Court, it is the task of the Prosecutor to prove guilt and in order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt. Rule 87 (A) of the ICTY RPE and ICTR RPE, respectively, states that a finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proven beyond reasonable doubt.

¹⁰⁷ The Prosecutor v. Akayesu (2 September 1998), para. 523.

¹⁰⁸ Also the ICTY has stated that attacks on cultural or religious property or symbols can be related to the determination of specific intent. See Prosecutor v. Krstic (2 August 2001), para. 595. It should be noted that the crime of genocide has had less prominent place in the ICTY Statute compared to the ICTR Statute. According to van den Herik, this may be a result from labelling the events in the Balkan, excluding Srebrenica, as ethnic cleansing. See van den Herik 2007, pp. 79-80.

¹⁰⁹ Prosecutor v. Kayishema and Ruzindana (21 May 1999), para. 93.

¹¹⁰ The Prosecutor v. Akayesu (2 September 1998), para 532. The ICTR stated therein that “[M]en and women, old and young, were killed without mercy. Children were massacred before their parents’ eyes, women raped in front of their families. No Tutsi was spared, neither the weak nor the pregnant.”

¹¹¹ Prosecutor v. Bagilishema (7 June 2001), para. 63.

When comparing the list of indicators above with the findings of the Fact-Finding Mission, a lot of resemblance can be found. The Report establishes that there been, among others, systematic criminal attacks against the Rohingya as a group, destruction of their properties and hate speech.¹¹² Therefore, it can be concluded from the above that the fact-finding missions bear an important role by laying down the facts and evidence to the acknowledge of the international community. In that sense, it is easy to second Bassiouni's view that the task of such missions is utmost important: while cries for accountability for "ethnic cleansing" or "mass rapes" by the media or reports can be overlooked or ignored, the large-scale and detailed evidence gathered by the fact-finding missions cannot.¹¹³

Evidence-wise, the fact-finding missions shall follow the practices established for commissions of inquiry and fact-finding missions, as outlined in the 2015 OHCHR publication.¹¹⁴ From that publication it can be concluded that the evidence for proving special intent by the fact-finding mission is lower than that required in the criminal proceedings. The standard of proof will be met, when a sufficient and reliable body of primary information, being consistent with other information provided, would allow an ordinarily prudent person to reasonably conclude that a case, incident or pattern of conduct had occurred.¹¹⁵ When making factual determinations about the destruction of the Rohingya, the Fact-Finding Mission has therefore employed the standard of reasonable grounds in accordance with the above-mentioned guidance and practices.

Although the level of proof is lower for the Fact-Finding Mission, the task at the operational level is difficult. Potential witnesses are afraid to speak their experiences even confidentially. According to the Report, even the aid workers, diplomats, journalists were in some cases unwilling to share their information to the Fact-Finding Mission. This was because of the risk that it might hinder their future access to Myanmar and they might face reprisal measures. Therefore, one of the utmost specific attention of the Mission is to protect the victims and the witnesses.¹¹⁶

¹¹² A/HRC/39/CRP.2.

¹¹³ Bassiouni 1997, p. 41.

¹¹⁴ Commissions of Inquiry and Fact-Finding Missions – Guidance and Practice 2015.

¹¹⁵ To learn more about the methods of meeting the standard of proof and the notion of first and second-hand information, see A/HRC/39/CRP.2, paras. 10-18.

¹¹⁶ A/HRC/39/CRP.2, paras. 26-29. Also, ICC-RoC46(3)-01/18/37, paras. 47-48.

3.3 The status of “crime of crimes”

A lot of the special condemnation of genocide derives from the history behind the international criminalization of the crime. Therefore, genocide has been in many cases put in a pedestal, to the top of the pyramid of crimes, as being the most heinous international crime. Among others, genocide has been described as “crime of crimes”¹¹⁷, “epitome of evil”¹¹⁸, “extreme of evil”¹¹⁹ and “the ultimate human rights problem”¹²⁰. International co-operation is required “*in order to liberate mankind from such an odious scourge*.”¹²¹ There seems to be, however, differencing views also.

In the case of Darfur, there has been critique relating to the public interest being focused too much on whether or not there existed a genocidal policy in the Sudanese Government.¹²² Also, some have contested that there should not be ranking between the most serious crimes, as elements of such crimes may overlap and be closely related.¹²³ For example, when comparing genocide and crimes against humanity, it can be concluded that whereas Article II of the Genocide Convention protects the four groups, national, ethnical, racial and religious, crimes against humanity have a broader scope concerning the civilian population. Further, whereas genocide is concerned with physical destruction or extermination of the protected groups, crimes against humanity entail, in accordance with Article 7 of the Rome Statute, attacks against fundamental rights of various forms. Even though the repercussions and effects of the both may overlap, genocide is not considered to be a special form of crimes against humanity. Therefore, a separate conviction for both is needed in order to punish the wrongfulness of the acts in their entirety and to the fullest extent.¹²⁴

The protected values that are so fundamental give the crime of genocide its status. Although the ICTR Appeals Chamber stated in *Kayishema and Ruzindana* that there is no hierarchy of crimes under the ICTR Statute and that all crimes therein are serious violations of

¹¹⁷ Schabas 2012, p. 4.

¹¹⁸ May 2010, p. 4.

¹¹⁹ Drumbl 2007, p. 4.

¹²⁰ Aquilina & Mulaj 2018, p. 123.

¹²¹ Genocide Convention, Preamble.

¹²² S/2005/60 (Darfur Report), para. 522. The report stated that even though it did not find that genocide would have taken place in Darfur, it should not be taken as detracting from or belittling the gravity of the crimes perpetrated in that region.

¹²³ Prosecutor v. Krstic (19 April 2004), paras. 219 et seq.

¹²⁴ Werle & Jessberger 2014, p. 325.

international humanitarian law¹²⁵, there is however something special about the crime of genocide. For example, in the *Krstic* case, the judges have noted that the characteristics of genocide breaching the protection of right to life of human groups makes the crime exceptionally grave and distinguishes it from other crimes. The tribunal used persecution, prohibited under the crimes against humanity, as an example. There the perpetrator chooses his victims because they are members of certain specific community, he does not necessarily aim at destroying such community as such.¹²⁶

3.4 Status of the crime of genocide outside the Genocide Convention

As it has been established above, the Genocide Convention defines the crime of genocide and contains the aim for preventing and punishing the crime. However, genocide has significant status outside the Genocide Convention as well, as it is part of customary international law¹²⁷ and has a status of *ius cogens*.¹²⁸

The origins of the Genocide Convention show that the will of the UN General Assembly was to punish genocide as a crime under the international law. The UN General Assembly described genocide as a denial of existence of entire human groups, which is contrary not only moral law but also the spirit and aims of the UN.¹²⁹ As a consequence of that, the principles contained in the Genocide Convention are binding on states, even without any conventional obligation, as the prohibition of genocide is vested in the principles of civilized nations. Further, the cooperation of states in preventing and punishing genocide has an universal scope.¹³⁰ This status has also been endorsed by the international tribunals.¹³¹

In relation to genocide, after the adoption of the Genocide Convention, the major substantive provisions of the Genocide Convention have gradually evolved into being customary

¹²⁵ The Prosecutor v. Kayishema and Ruzindana (1 June 2001), para. 367.

¹²⁶ Prosecutor v. Krstic (2 August 2001, para. 53. Compared to genocide, crimes against humanity are mass crimes committed against a civilian population. They do not, however, need to target a specific group, nor is a specific intent to destroy required. Therefore, the term of the crimes against humanity is broader. However, the crime genocide is *lex specialis* in relation to crimes against humanity. See, Prosecutor v. Krstic (19 April 2004), paras 222 *et seq.* Nhimana et al, ICTR (AC), judgment of 28 Nov 2007, para 1029.

¹²⁷ Advisory Opinion, Reservations to Genocide Convention (28 May 1951), para. 47.

¹²⁸ Barcelona Traction case (Judgement of 5 February 1970), para. 32.

¹²⁹ A/RES/96/1. Also the ICJ has seconded the content of this resolution, see *Genocide Case* (Judgment of 26 February 2007), para 49.

¹³⁰ A/RES/96/1; Advisory Opinion, Reservations to Genocide Convention (28 May 1951), p. 23.

¹³¹ Advisory Opinion, Reservations to Genocide Convention (28 May 1951), p. 23; Prosecutor v. Kupreskic (14 January 2000), para. 520.

international law. The peremptory norm of genocide, Article II of the Genocide Convention, has been included in the statutes of the ICTY, ICTR and most recently, in the statute of the ICC.¹³² According to the scholars, this reflects the states' reactions to the crime of genocide and how it is collectively seen as something the world needs to eradicate from the globe.¹³³

The common understanding is that *ius cogens* norms should be respected and because of that, states cannot take any actions which are against such norms.¹³⁴ However, when dealing with *ius cogens* norms, also their enforcement should be considered. While *ius cogens* norms contain the idea of hierarchy of norms and international public order, the obligations *erga omnes* deal with the enforcement of *ius cogens* norms. When a breach of *ius cogens* takes place, it is thus a legal interest of any member of international community to protect and take steps to enforce these norms, even if it is not directly affected.

The relationship between *ius cogens* and *erga omnes* is also recognized in the case law of the international tribunals. In the *Kupreskic* case, the ICTY held that peremptory norms of international humanitarian law (including prohibition of genocide) are norms of *ius cogens* which give rise to obligations *erga omnes*.¹³⁵ The concept of *erga omnes* appeared also in the *Barcelona Traction Case*, where the ICJ stated that obligations towards international community as a whole do exist and all states have a legal interest in protecting them because of their importance.¹³⁶ Further, the ICJ stated in its decision of 1996 that rights and obligations of the Genocide Convention are *erga omnes*. Obligation to prevent and punish the crime of genocide is not territorially limited by the Genocide Convention.¹³⁷

The concept of *ius cogens* is therefore two-folded: on one hand, the status imposes obligations *erga omnes*¹³⁸ upon states, and on the other hand, it gives rights to the states to proceed against perpetrators of such *ius cogens* crimes.¹³⁹ This seems to be in line with the

¹³² See Statute of ICTY, Statute of ICTR and Rome Statute.

¹³³ Reydamns 1996, p. 23, Wouters & Verhoeven 2005, p. 404.

¹³⁴ ILC Draft Articles, Art. 50.1 (d), Wouters & Verhoeven 2005, p. 403. Necessity, emergence or self-defence are no justification of breach of *ius cogens* norms. Also, even the possible countermeasures taken by a state must comply the peremptory norms no matter what.

¹³⁵ Prosecutor v. Kupreskic (14 January 2000), para. 520.

¹³⁶ Barcelona Traction Case (Judgement of 5 February 1970), para. 33.

¹³⁷ Application of Genocide Convention, judgement of 11 July 1996, para 31

¹³⁸ *Erga omnes* means "flowing to all". In Barcelona Traction Case, the ICJ stated that "*an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have legal interest in their protection; they are obligations erga omnes.*" See Barcelona Traction Case (Judgement of 5 February 1970), para. 33.

¹³⁹ Bassiouni 1996, pp. 65 and 67.

UN General Assembly's view when it stated that preventing and punishing genocide has an universal scope.

Considering the legal definition of genocide, the features that make it the crime of crimes, added with its status as peremptory norm, it seems that in the there is a gap between the legal framework and the (legal) reality. Since adopting the Genocide Convention, there has been a good number of genocide cases, which have in many parts left the perpetrators unpunished. Even the common sense says that a breach of treaty obligation, let alone a breach of *ius cogens* norm, should strongly imply accountability and condemnation of the crime. As Bassiouni further states, bridge between legal framework and reality can be built by international pronouncements and scholarly writings in some part, but the threshold question remains the same: how we can ensure that norm, whether deriving from convention or *ius cogens*, is effectively enforceable under international criminal law and creates responsibility in case of breach thereof.¹⁴⁰

3.5 Concept of genocide in discourse

3.5.1 The legal and social norm

Even though genocide is one of the most heinous abuses of human rights, the reactions of European governments in the post-Cold War era have not matched the severity of the crime. European governments rarely have agreed on calling a situation genocide and their contribution on preventing genocide has often been limited to serving humanitarian aid to victims and supporting prosecution in the international criminal tribunals. Given the nature of the crime of genocide and the importance of the protection of human rights, it would be reasonable to assume that the states would have a unanimous view how they should respond to a genocide being committed in another country, and that the response would be forceful and assertive. However, as Smith concludes, more coercive measures such as sanctions and military interventions have usually been considered as unnecessary or irrational.¹⁴¹

¹⁴⁰ Bassiouni 1996, pp. 66-67.

¹⁴¹ Smith 2010, Prewords and p. 1.

For instance, during the Rwandan genocide, the international community delayed the use of the “g-word” several weeks, even though the events screamed genocide.¹⁴² Fast forward to Darfur, the United States did not want to shy away from calling the situation genocide, although months later, the Commission, which was established to enquire whether genocide had happened, stated that no evidence could be found of special intent.¹⁴³ The behavior of the international community in these situations is somewhat contradictory.

Smith has examined the attitudes and reactions of the European governments towards genocide. Her studies establish that in addition to the legal norm against genocide, there is also a social one.¹⁴⁴ Legal norm can be found from Article II of the Genocide Convention and from statutes of international tribunals. Social norm, in turn, is consistent with the moral perspective, and used by, for example, journalist and commentators in the public parlance.¹⁴⁵ To clarify the difference, by the words of Milanović, “[t]o the average lay person, genocide is any organized, planned mass murder of human beings on account of their race, ethnicity, religion or other personal characteristic.”¹⁴⁶ Therefore, as the social norm concentrates more on the aspect of mass killing of all human groups without the specifics of genocide, it is broader than the legal norm in most parts¹⁴⁷. This difference may well be one of the reasons why the Genocide Convention has faced critique for its inadequate provisions to prevent and punish genocide.¹⁴⁸

If we look more closely the differences between the legal and social norm of genocide, the most visible difference is, what kind of action is required or presumed from the states in the event of genocide. Again, the wording Genocide Convention only provides that states undertake to prevent and punish genocide.¹⁴⁹ What prevention means in practice is not included in the Genocide Convention. It does, however, contain certain requirements for punishment.

The social norm, in turn, is linked to our moral values, and therefore requires prompt reaction and response to the genocide. If it is not an obligation, it is a strong expectation, that states

¹⁴² It has been argued that the CIA had considerable knowledge about the Rwandan genocide beforehand. See, for example, Heinze 2007, p. 360.

¹⁴³ Smith 2010, p. 222.

¹⁴⁴ Smith 2010, pp. 6-7; van den Herik 2007, pp. 75-76.

¹⁴⁵ Smith 2010, pp. 6-7

¹⁴⁶ Milanović 2006, p. 557.

¹⁴⁷ Article II of the Genocide Convention contains also other acts beside ‘killing’.

¹⁴⁸ Smith 2010, pp. 6-7.

¹⁴⁹ Genocide Convention, Article I.

take all measures to stop genocide, even military force, if it is necessary.¹⁵⁰ This can be concluded and deducted also from the media and press reports that have called for action in the case of the Rohingya.¹⁵¹ Alongside of the legal obligation to prevent genocide, the UN Framework Analysis relating to prevention also urges to prevent pursuant to the moral responsibility to do so.¹⁵²

The differences between the contents and the expectations of the norms are the point where the political will of the states comes to play. According to Heinze, denying the existence of genocide may well be a choice to deny the legal norm to avoid the obligations under the Genocide Convention to prevent and punish genocide. This was the case in the Rwandan genocide. There the Clinton administration officials avoided using the term genocide for as long as they could because of the fear that they would be obliged to act pursuant to the Genocide Convention. Further, supporting the social norm of genocide and appealing to the moral duties may also well be a justification for intervention.¹⁵³ This was the case with the unauthorized bombings of Kosovo by the United States.

In her studies, Smith also found other reasons for not naming genocide. These seem to correspond with the facts of the Rohingya crisis. Firstly, Smith argues that the debate, whether or not there is genocide taking place, has been transferred to the legal system. This means that the reluctance to use the term “genocide” is unwillingness to declare it before tribunals do. This also coheres with the argument that genocide as a term is stigmatized¹⁵⁴. In a situation where it is unsure if the elements of genocide are existing (bearing in mind the standard of proof required), the “political correctness” and diplomacy wins. This kind of behavior is, however, quite problematic as the definitive ruling on the existence of genocide is received well after the genocidal events. Some see that broadening the definition of genocide, loosening the elements of the crime, would weaken the desired terrible stigma of the crime and add another difficulty to the issue of cumulative offences (*concursum delictorum*).¹⁵⁵

¹⁵⁰ Smith 2010, p. 7.

¹⁵¹ See, for example, The Globe and Mail 2017.

¹⁵² Framework Analysis, p. 2. It is stated therein that “[a]part from the moral and ethical responsibility that we all have to protect populations at risk of atrocity crimes, both individually and collectively, there are also well-established legal obligations to do so.”

¹⁵³ Heinze 2007, pp. 359-360.

¹⁵⁴ Schabas 2009, p. 30.

¹⁵⁵ Kreß 2006, p. 500.

Second reason for the inactivity of the states has been the fact that governments have been genuinely convinced of the existence of civil war where one side may have been nastier than the other, but no side was angelic. Therefore, in that situation, any activity would have meant taking sides. States also grounded their inactivity on the fact that invoking genocide may make humanitarian aid more difficult.¹⁵⁶

These findings of Smith, at least in some form, can be found also from the Rohingya crisis. Most of the international community started talking about genocide happening in Myanmar after the Fact-Finding Mission released its Report. Assumably, this was because of the impartial and well gathered evidence that did not leave room for staying passive anymore. There are, however, China and Russian Federation and some others that still claim that the mass killings in Myanmar is still a domestic issue where the international community should not interfere.¹⁵⁷

3.5.2 Genocide v. ethnic cleaning

Until the release of the Report by the Fact-Finding Mission, the Rohingya crisis was mostly called as ethnic cleansing, instead of genocide.¹⁵⁸ One of the biggest controversies, that followed the genocides of the 1990s, was the question if ethnic cleansing constitutes genocide. As it will be established, these two crimes have a distinct, but intertwined¹⁵⁹, meaning and diverse effects to the obligations of the international community.

The term ethnic cleaning was used in connection with the Bosnian crisis as a reference to the practice of Serb forces in Bosnia and Herzegovina when forcing the Muslims and Croats out of their traditional areas of settlement. This expulsion was a part of a plan to create a territory solely for the Serbs, which would then be united with Serbia to form a 'Greater Serbia'. During such operations, civilians were massacred, sexual abuses committed, cities were bombarded, and personal properties destroyed and confiscated.¹⁶⁰

¹⁵⁶ Smith 2010, pp. 139-140.

¹⁵⁷ UN Meetings Coverage 2018.

¹⁵⁸ See for example <https://news.un.org/en/story/2017/09/564622-un-human-rights-chief-points-textbook-example-ethnic-cleansing-myanmar>. Last visited. 18 December 2018.

¹⁵⁹ Prosecutor v. Krstic (2 August 2001), para. 562. The ICTY stated that "*there are obvious similarities between genocidal policy and the policy commonly known as ethnic cleansing*".

¹⁶⁰ Genocide case (Judgement of 26 February 2007).

The standard view¹⁶¹ is that ethnic cleansing means expulsion of a group from a specific territory. The ICJ stated in its judgement in 2007:

“[n]either the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is “to destroy, in whole or in part” a particular group, and deportation or displacement of the members of the group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”¹⁶² ”

However, there have been also diverging views. In 1993, judge Lauterpacht argued in his separate reasons that ethnic cleansing was a form of genocide, because the intent was to destroy at least part of a group that resided in certain location.¹⁶³ Schabas expressed his view on the matter as follows:

“it is incorrect to assert that ethnic cleansing is a form of genocide, or even that in some cases, ethnic cleansing amounts to genocide. Both, of course, may share the same goal, which is to eliminate the persecuted group from a given area. While the material acts performed to commit the crimes may often resemble each other, they have two quite different specific intents. One is intended to displace a population, the other to destroy it.”¹⁶⁴ ”

This does not, however, mean that events that start as ethnic cleansing would not expand in genocide in the end. The ICJ further stated accordingly that ethnic cleansing may constitute genocide, if the acts committed fall into the scope of Article II of the Genocide Convention and special intent can be established.¹⁶⁵ This view has also been seconded by Werle and Jessberger, who argue that ethnic cleansing describes a complex criminal phenomenon, a policy which implementation leads to serious human rights breaches while aiming to force

¹⁶¹ See, for example, Jessberger 2007, p. 104; Milanović 2006, p. 593; Genocide Case (Judgement 26 February 2007), paras. 190 *et seq.*

¹⁶² Genocide case (Judgement of 26 February 2007), para. 190.

¹⁶³ Genocide case (Provisional Measures Order, 13 September 1993), Separate opinion of Judge Lauterpacht, paras. 69-70

¹⁶⁴ Schabas later examined the forcibly transfer of children from one group to another group, as entailed in Article II(e) of the Genocide Convention, against genocidal intent (intent to destroy) and came into conclusion that literal reading of the Genocide Convention could possibly extend to ethnic cleansing but the travaux préparatoires of the Genocide Convention evidence otherwise. See Schabas 2012, p. 114-115.

¹⁶⁵ Genocide case (Judgement 26 February 2007), para. 190. Also, Genocide case (Judgement of 3 February 2015), para. 376.

a group of people out of certain region to change the ethnic composition of the population. Whether the definition of ethnic cleansing fulfills the criteria for genocide is a complicated question. The blanket classification of ethnic cleansing as genocide cannot be used: the act plus the intent of the act does not necessarily equal in genocide.¹⁶⁶

What are the consequences if we choose to call a situation as ethnic cleansing versus genocide? Pursuant to the Genocide Convention, ethnic cleansing does not have any legal significance of its own and cannot be therefore prosecuted as a separate crime. However, this does not mean that the material elements of ethnic cleansing would not fall under the criteria of other mass atrocities. Above it has been established that ethnic cleansing may constitute genocide, if *actus reus* and *mens rea* are fulfilled. In addition, it might fulfill the criteria of crimes against humanity and therefore be prosecuted under that crime. But in the case ethnic cleansing does not amount to genocide, the obligations under the Genocide Convention, namely preventing and punishing genocide, cannot be invoked. This is one of the reasons why the international community refrains from naming genocide and lingers on “lesser crimes”.¹⁶⁷ However, for the victims, genocide may represent the only adequate way to describe their suffering and the loss of their heritage.¹⁶⁸ Therefore, it can be disappointing when their suffering is overlooked and categorized “merely” as ethnic cleansing or crime against humanity.

¹⁶⁶ May 2010, p. 106.

¹⁶⁷ Smith 2010, pp. 19-21.

¹⁶⁸ Schabas 2012, pp. 102, 121

4 PREVENTING GENOCIDE

*“Genocide is the ultimate crime and the gravest violation of human rights it is possible to commit. Consequently, it is difficult to conceive of a heavier responsibility for the international community and the Human Rights bodies of the United Nations than to undertake any effective steps possible to prevent and punish genocide in order to deter its recurrence.”*¹⁶⁹

4.1 Purpose of preventing genocide

The Genocide Convention recognizes the great losses on humanity by genocide and requires cooperation of the states for preventing genocide.¹⁷⁰ Therefore, to understand more deeply the obligation to prevent, a brief look is made into the purpose behind the prevention of genocide.

Most visible reason of prevention of genocide is the preservation of human life.¹⁷¹ As genocide is a large-scale event, a significant loss of human life is avoided through preventing. The genocide in Rwanda escalated in the death of about 800,000 Tutsi population¹⁷², the Report of the Fact-Finding Mission estimated that the security forces in Myanmar have killed 10,000 Rohingya Muslim.¹⁷³ Even though the numbers are not equivalent, every life saved is just as valuable. But there are other reasons, too.

The UN Security Council has recognized genocide as a threat to international peace and security and this view has been supported by, among others, by the ICC.¹⁷⁴ Preventive measures will therefore contribute in most cases to national peace and security, but they also have an effect at the international level, as genocide commonly creates tensions between neighboring states.¹⁷⁵ If we look at the situation at the border of Myanmar and Bangladesh, this has a true ring to it.

¹⁶⁹ E/CN.4/Sub.2/1985/6.

¹⁷⁰ Genocide Convention, Preamble.

¹⁷¹ Genocide Convention, Preamble.

¹⁷² Smith 2010, p. 142.

¹⁷³ A/HRC/39/CRP.2, para 1008.

¹⁷⁴ Rome Statute, Preamble.

¹⁷⁵ A/HRC/39/CRP.2, para. 99.

Also, when comparing to punishment of genocide, prevention is less expensive measure to stop genocide or deal with its aftermath. Prevention enables the early engagement of the international community and is less exposed to political judgment calls. Through the preventive measures, states can reinforce their sovereignty and are in fact, fulfilling their responsibilities towards its citizens and international community.¹⁷⁶ Against this purpose, the prevention of genocide seems the most effective way to stop genocide from taking place.

4.2 Definition of prevention

4.2.1 Obligation to prevent under Genocide Convention

International cooperation is a key requisite to prevent genocide.¹⁷⁷ According to Article I of the Genocide Convention, the parties to the convention have undertaken to prevent and punish genocide. The wording of the said Article establishes prevention and punishment in the same context, but it can be concluded, for example based on the *Genocide* case, that the obligation to prevent has an independent nature.¹⁷⁸ The relationship of the obligation to prevent and obligation to punish is however related to one another. For instance, using Ben-Naftali's example, when these obligations are put on a time line, punishment indicates that genocide has been committed, which, in turn, indicates the failure of the obligation to prevent.¹⁷⁹

The scope and the meaning of the obligation to prevent, as the Genocide Convention describes it, is, however, lacking content in the operational level. Purely sticking to the wording of the Genocide Convention, the obligation to punish stands out compared to the obligation prevent. The Genocide Convention refers explicitly, in addition to above mentioned Article I, to the obligation to prevent only in its Article VIII, which provides that:

“[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they

¹⁷⁶ Framework Analysis 2014, p. 2.

¹⁷⁷ Genocide Convention, Article I.

¹⁷⁸ Genocide Case (Judgement 26 February 2007), paras. 382-383.

¹⁷⁹ Ben-Naftali 2009, p. 29.

consider appropriate of the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.”

To compare, punishment and criminal proceedings are in the core of Articles III-VII of the Genocide Convention. Purely based on this comparison, it could be interpreted that the Genocide Convention prefers punishment as a mean of repression instead of prevention. And more importantly, the criminalization of genocide serves the main object of the Genocide Convention, not prevention.¹⁸⁰

Case law of the international tribunals has been very contributive in developing the concept of prevention of genocide. In its judgment concerning the *1951 Advisory Opinion*¹⁸¹, the ICJ stated that the obligation to prevent is an independent obligation. This was further iterated in the judgement in 2007, where the ICJ stated that the two obligations have a close link, in accordance with Article I of the Genocide Convention, but the obligation of prevention has its own legal existence of its own, too.¹⁸² Compared to the starting point that punishing genocide means failing to prevent, the ICJ confirmed that firstly, there is an obligation to prevent, which is continued with an obligation to punish.¹⁸³

At the time of the adoption of the Genocide Convention, the content of prevention was, as Ben-Naftali describes it, “*morally pregnant but normatively empty concept*”. When looking at the wording of Article I of the Genocide Convention, it indeed gives little indication as to what it entails in concrete. However, it also has been argued by Ben-Naftali that the lack of precision may well be the strength of the Genocide Convention in the end, because it has provided a space for creative, purposeful interpretation by the international tribunals.¹⁸⁴

All in all, when examining the duty to prevent, it can be noticed that the Balkan crisis resurrected the duty to prevent genocide from the oblivion when the importance of prevention was recalled. Also, the setting up of the ICTY was a step to establish more preventive components. It was, however, the ICJ, which determined the scope and specific normative content of the obligation to the prevent in the Genocide case.¹⁸⁵

¹⁸⁰ Ben-Naftali 2009, pp. 29–30.

¹⁸¹ Advisory Opinion, Reservations to Genocide Convention (28 May 1951), para 23.

¹⁸² Genocide Case (Judgement 26 February 2007), para. 426.

¹⁸³ Genocide Case (Judgement 26 February 2007), para. 430.

¹⁸⁴ Ben-Naftali 2009, pp. 29 and 33.

¹⁸⁵ Milanović 2006, p. 553-554.

4.2.2 Scope of the obligation to prevent according to the ICJ

In the 2007 judgement, the ICJ clarified the content of the obligation to prevent. The scope can be summarized as follows:

The ICJ limited the *ratione materiae* of the obligation to prevent to genocide, as it is referred to in Article II of the Genocide Convention, consisting of the acts referred to in Article III of the Genocide Convention.¹⁸⁶ Therefore, the term ‘prevention’, in the meaning how it is possibly defined in other conventions or treaties, does not apply.¹⁸⁷ Relating to the *ratione temporis*, the ICJ held that it arises “*at the instance that a state learns of, or should have learned of, the existence of a serious risk that genocide will be committed*”.¹⁸⁸ This, however, is applicable to the extent that genocide is ultimately carried out. Further, the court stated that the *ratione loci* of the obligation is not limited territorially. Therefore, each state has an obligation prevent and punish genocide.¹⁸⁹ In 1993, judge Lauterpacht clarified the court’s view his separate opinion by stating that any territorial limitations would mean that a party obliged to prevent genocide within its own territory would not be obliged to do so in a territory which it invades and occupies. Limited action would thus mean permissibility of inactivity, which contradicts the very idea behind the Genocide Convention.¹⁹⁰ In the 2007 judgement the ICJ did recall the object and purpose of the Genocide Convention: the universal nature of condemnation of genocide and cooperation to eliminate it.¹⁹¹

This all would thus mean the obligation to prevent would arise immediately when a state learns, or should have learned of the serious risk of genocide will be committed. The peremptory effect of this obligation is, however, pending on the positive ruling of genocide. As regards to Rohingya crisis, the events that took place in 2017 would hardly leave the international community unaware of the serious risk of genocide being committed. In this case, the international community, including Myanmar, is late in their actions.

¹⁸⁶ Genocide case (Provisional Measures Order, 13 September 1993), Separate pinion of Judge Lauterpacht,, para 434.

¹⁸⁷ Genocide Case (Judgement 26 February 2007), para. 429.

¹⁸⁸ Genocide Case (Judgement 26 February 2007), para. 431

¹⁸⁹ Genocide Case (Judgement 26 February 2007), para. 432-438. See also dissent of Judge ad hoc Kreca, paras. 58-68 ja separate opinion of Judge Tomka, paras 62-68.

¹⁹⁰ Genocide case (Provisional Measures Order, 13 September 1993), Separate pinion of Judge Lauterpacht, paras.444-445.

¹⁹¹ Genocide Case (Judgement 26 February 2007), paras.432-438.

4.2.3 Obligation to prevent under the doctrine of due diligence

In the judgment of 2007, the ICJ stated that the obligation to prevent is one of conduct, not of result (in the meaning that the preventive measures would be successful) and much depends on the circumstance of the particular case. For this purpose, the court introduced the concept of due diligence. This means that states must take all means reasonable available to prevent and must face responsibility if it manifestly fails to take all measures to prevent that were within its power.¹⁹²

The doctrine of due diligence was not a new invention, as the ICJ had refer to it in its earlier cases. For example, in the *Corfu Channel* case, the court stated that Albania was held responsible on the basis that it must have known, according to the evidence gathered, that the mines laid in the Corfu Strait and therefore failed to warn ships passing through the strait and breached its international obligation.¹⁹³ Subsequently, the ICJ has endorsed the due diligence doctrine in the *Genocide Case*.¹⁹⁴

In the *Genocide* case, the ICJ did emphasize that due diligence required assessment *in concreto*. The essence of the issue was the capacity of the state to effectively influence the actions of persons likely to commit genocide, which, according to the court, varied from one state to another and depended on many elements. These elements may be geographical distance of the state concerned, strength of the political and other links, between the state and the main actors in the genocidal links.¹⁹⁵ However, ultimately, the obligation to prevent is limited to the acts permitted by international law.

As the court put it, the scope of a state's obligation to prevent genocide is directly proportionate to its ability and influence over relevant perpetrators.¹⁹⁶ Pursuant to that 'classification', Milanović has contemplated whether it would be possible generalize which states would be under the obligation to act with preventive measures? He recognizes three different situations and suggests following: Firstly, minor states would probably be obligated to cooperate¹⁹⁷ with other states, above all, by diplomatic pressure. More greater powers, in

¹⁹² *Genocide Case* (Judgement 26 February 2007), para. 430.

¹⁹³ *Corfu Channel Case* (9 April 1949), pp. 19-22.

¹⁹⁴ *Genocide Case* (Judgement 26 February 2007), para. 430.

¹⁹⁵ *Genocide Case* (Judgement 26 February 2007), para. 430.

¹⁹⁶ *Genocide case* (Judgement of 26 February 2007), para. 75.

¹⁹⁷ According to Milanović, this would be in line with Article 41 of the ARSIWA, regulating the aggravated regime of state responsibility. See Milanović 2007, p. 686 and footnote 86 therein.

turn, would have to be much more active with their preventive measures and lastly, states which are directly involved with the events, would have even greater obligations.¹⁹⁸

To apply Milanović's logic into the Rohingya crisis, it could be concluded that major powers, such as the permanent members of the UN Security Council, would have the obligation to prevent, at least because of their political strength. Geographically measured, Bangladesh would be one of the most obvious ones, being a cross-border neighbor and directly affected by the crisis. At the same time, it could be argued that Bangladesh is doing its share by supporting the refugee camps and negotiating on the safe repatriation of the Rohingya.¹⁹⁹

If it is true, that the obligation to prevent genocide is not limited temporally (*ratione temporis*) and that states are under a general obligation to do all in their power, through legislation or other measures, to prevent genocide, a temporally determinable element is still required. To cite Gattini, the "*presence of a real and serious danger of genocide*" so that the obligation to prevent can be concretized.²⁰⁰ This however raises a question whether general awareness of a history of hatred over the years in a certain place equals with a real and present danger of genocide with genocidal plan, i.e. when the situation evolves into kind that triggers due diligence?²⁰¹

The above-mentioned issue may be relevant also as regards to the safe repatriation of the Rohingya from Bangladesh to Myanmar. Safe repatriation has also been the recommendation of the Advisory Commission and the Fact-Finding Mission.²⁰² Myanmar and Bangladesh agreed on a new bilateral treaty basis in November 2017 of the process of the repatriation. Pursuant to that treaty the return of the was set to start by mid-November 2018.²⁰³ The timing, however, seems troubling. Firstly, according to Channel NewsAsia, UNCHR was not involved on the agreement concerning repatriation, although it was a requirement under the first agreement. Secondly, the Myanmar government has not given any guarantees that the Rohingya will receive their citizenship when returning, or have their land or properties (what is left of it) back, nor that their safe return is secured.²⁰⁴ Would this

¹⁹⁸ Milanović 2007, p. 686.

¹⁹⁹ Channel NewsAsia November 2018.

²⁰⁰ Gattini 2007, p. 704.

²⁰¹ Gattini 2007, p. 704.

²⁰² Advisory Commission Final Report 2017; A/HRC/39/CRP.2, paras. 1678-1679.

²⁰³ Channel NewsAsia October 2018.

²⁰⁴ Channel NewsAsia November 2018.

mean that sending Rohingya back knowing that the violence may continue and there is no guarantee for their safety that the due diligence obligation would be triggered?

Turning back to prevention of genocide, another relevant question is, what the states can do in concrete? Sanctions and cutting financial ties are alternatives, along with arms embargo. The Fact-Finding Mission considered in its Report that targeted individual sanctions, such as travel bans and asset freezes, could stop the violations of international law. Such sanctions should not, however, have any influence on the broader population, as it may weaken the conditions of the Rohingya further.²⁰⁵

Gattini makes an interesting point by stating in relation to concrete measures of prevention that the ICJ “*in a way throws doubt on their efficacy when it recognizes that the genocidal events ‘took a very short time’*”.²⁰⁶ This would mean that if genocidal events do not take long time, there would not be much chances to prevent them. However, in this context it should be recalled that prevention of genocide is not an act of result.²⁰⁷ Doing nothing is a strong implication to the perpetrators that their acts are permissible.

4.3 UN framework for prevention

4.3.1 The purpose of the framework

To bring more flesh to the bones of obligation to prevent, the Special Advisors of Genocide and on the Responsibility to Protect have developed a Framework Analysis for the Prevention of Atrocity Crimes, including genocide. The background idea of the framework is to be more alert, pay more attention to the warning sign and facilitate the assessment of risk of genocide.²⁰⁸

The UN has recognized four reasons for preventing atrocity crimes. Firstly, the most compelling is preserving human life in the sense of physical, psychosocial and psychological damages and trauma. Secondly, preventive measures also contribute to national, regional and international peace and stability. Thirdly, the cost of prevention is less than intervening, as rebuilding nations after humanitarian crises and wars requires a significant amount of

²⁰⁵ A/HRC/39/CRP.2, para. 1666 and 1668.

²⁰⁶ Gattini 2007, p. 705. See also, Genocide Case (Judgement 26 February 2007), para. 423.

²⁰⁷ Genocide Case (Judgement 26 February 2007), para. 430..

²⁰⁸ Framework Analysis 2014, p. 5.

international support and time. Prevention is also less politically charged measure than, for example, the decision to intervene. Fourthly, preventive measures are considered as reinforcement of sovereignty of the territorial state, when it commits to prevent genocide targeted to its own population. Then, there is less need for the international community to intrude.²⁰⁹

The risk factors and indicators have been divided into two categories: common and specific risk factors for each of the atrocity crimes. The existence such factors will increase the risk of occurrence of genocide or indicated its potential or probability. However, not all risk factors need to be present and they are not ranked in anyway.²¹⁰ The very idea of the framework is that the earlier the risk factors to genocide are being recognized, the greater is the probability to succeed.²¹¹

4.3.2 The risk factors

The common risk factors have been recognized as common to all atrocity crimes. As it can be seen from the Rohingya crisis, it does not always have to be a typical armed conflict that puts the state into such level of stress that makes it more exposed to human rights violations that lead eventually to atrocity crimes. When there is, for example, political instability, threats to security of the state are more imminent.²¹²

According to UN framework, also past or current serious violations of international human rights establishing a pattern of conduct can lead to atrocity crimes. This is emphasized by policies and practices of impunity for or tolerance of the violations of human rights, and/or of their incitement.²¹³ The situation weakens if there are no national legal framework that serves protection for the people and ensure their human rights or if there is lack of an independent and impartial judiciary to protect these rights.²¹⁴ Combining those with pursuits to render certain areas homogenous in their identity based on supremacy of that identity,

²⁰⁹ Framework Analysis 2014, p. 2.

²¹⁰ Framework Analysis 2014, pp. 5 and 7.

²¹¹ Framework Analysis 2014, Preword and p. 4.

²¹² Framework Analysis 2014, p. 10. This is the risk factor #1: "*Situations of armed conflict or other forms of instability*".

²¹³ Framework Analysis 2014, p. 11. This is the risk factor #2: "*Record of serious violations of international human rights and humanitarian law.*"

²¹⁴ Framework Analysis 2014, p. 12. This is the risk factor #3: "*Weakness of State structures.*"

leading to “us” versus “them” construction implies higher degree of likelihood of mass atrocities.²¹⁵

Atrocity crimes are not easy to commit, as they need resources.²¹⁶ As genocide always require the special intent, the use of sources, access to them and the capacity to commit atrocity crimes must be evaluated with other risk factors. However, in the absence of preventive elements, such as lack of access of UN or other international actors, lack of willingness to engage in dialogue²¹⁷ with the international community and limited cooperation with human rights mechanisms, together with increased violations of various rights²¹⁸ and hate propaganda²¹⁹, the capacity to commit atrocity becomes more relevant.

The specific risk factors to genocide are derived from the legal definition of the crime. Persistent intergroup tensions and discrimination together with denial of existence of a protected group²²⁰ are likely transfer such patterns into genocide with special intent to destroy²²¹ the targeted, protected group.

The UN Framework Analysis has existed since 2014. Almost all the early warning signs that have been recognized therein, are applicable to the Rohingya crisis. The legal framework of Myanmar does not protect the Rohingya people, the administrative structure and the power is at the hand of the military forces and there has been no cooperation on the side of the Myanmar government to respond to the concerns of the UN, to name a few. Therefore, observing retrospectively, it cannot be claimed that the events in Myanmar were a surprise.

²¹⁵ Framework Analysis 2014, p. 13. This is the risk factor #4: “*Motives and incentives*”.

²¹⁶ Framework Analysis 2014, p. 14. This is the risk factor #5: “*Capacity to commit atrocity crimes*”. As it is stated in the ICISS Report, internal conflicts are, however, nowadays more complex and lethal due to modern technology and communications, which can be seen in the proliferation of cheap but highly destructive weapons. See ICISS Report 2001, para. 1.18.

²¹⁷ Framework Analysis 2014, p. 15. This is the risk factor #6: “*Absence of mitigating factors*”.

²¹⁸ Framework Analysis 2014, p. 16. This is the risk factor #7: “*Enabling circumstances or preparatory action*”.

²¹⁹ Framework Analysis 2014, p. 17. This is the risk factor #8: “*Triggering factors*”.

²²⁰ Framework Analysis, p. 18. This is the special risk factor #9: “*Intergroup tensions or patterns of discrimination against protected groups*”.

²²¹ Framework Analysis, p. 19. This is the special risk factor #10: “*Signs of an intent to destroy in whole or in part a protected group*.”

4.4 Relevance of hate speech

As it has been established, the events that have taken place in Myanmar are various in kind. One of the issues stood out from the Report of the Fact-Finding Mission, was the amount of hate speech against Rohingya. Therefore, this Thesis will focus more on that part.

The UN framework brings up as a specific risk factor for genocide, the official documents, political manifests, media records and other documents which imply intent or incitement to acts which may lead to genocide.²²² Also, the Fact-Finding Mission established in its Report, that after examining several forms of documents and social platforms such as Facebook, it could be concluded that such material has contributed in shaping a public opinion on the Rohingya and the Muslims in general. According to the Fact-Finding Mission, a hate campaign against the Rohingya had been operated by few key actors such as nationalistic political parties, leading Buddhist monks, academics and members of the Myanmar government.²²³ In the era of social media, is worthwhile to look deeper to the relevance of hate speech and how it has appeared in the case of the Rohingya and others, as well.

Public incitements are a quick way to defame the victims as a group, which creates or significantly increases of the risk for mass atrocities. Before 2011, the use of media and internet was heavily under the control of the military forces in Myanmar. After the liberalization, increasing access to internet and social platforms has facilitated remarkably from almost zero. Albeit the benefits of the liberalization in the pursuit of freedom of expression, association and peaceful assembly, it has also enabled the wider and faster distribution and spreading of hate speech. According to the Fact-Finding Mission, Facebook has been the main mode communication for Myanmar authorities as well.²²⁴

The Fact-Finding Mission was provided with magazine issued in February 2012 full of anti-Rohingya articles titled such as “*Black tsunami in a pitiful disguise*”, “*Slow invasion*” and “*What the Rohingya is*”. The last-mentioned article described the Rohingya as “*latest*

²²² Framework Analysis, p. 10.

²²³ A/HRC/39/CRP.2, para. 75.

²²⁴ A/HRC/39/CRP.2, paras. 1342-1345.

*weapon of the religious extremist terrorists” that “are trying their very best to steal the land”.*²²⁵ Also fake news was created against the Rohingya.²²⁶

The Fact-Finding Mission also examined many public statements from a wide variety of government officials and representatives, including military and security forces. One of them stated, as translated by the Fact-Finding Mission into English, that Rohingya are going to be eradicated, which was followed by “[w]e don’t want to hear any humanitarian or human rights excuses. We don’t want to hear your moral superiority, or so-called peace and loving kindness.”²²⁷

An urgent appeal had been made to Myanmar government already in July 2015 concerning the public incitements to kill Rohingya population. According to the appeal, it had come to the Special Rapporteurs’ acknowledge that a rally had been organized in a football ground with following agenda: “[i] won’t say much, I will make it short and direct. Number one, shoot and kill them! (the Rohingyas). Number two, kill and shoot them! (the Rohingyas). Number three, shoot and bury them! (the Rohingyas). Number four, bury and shoot them! (the Rohingyas). If we do not kill, shoot, and bury them, they will keep sneaking into our country!”²²⁸

The material element of incitement requires that commission of genocide by the perpetrator is called for. Incitement does not have to be express, also euphemistic, metaphorical or otherwise coded language that can be nevertheless understood clearly to the addressed audience²²⁹. However, just provocative expressions or hate speech in general is not sufficient, it must appeal to commit an act referred in Article II of the Genocide Convention. In this context, public means an appeal made in a public place or through a medium targeted at the public to a non-individualizable audience.²³⁰

The form of the public incitement can vary. For example, in relation to Rwanda genocide, the Hutu had taken control over the radio stations and used them to conduct an extreme hate

²²⁵ A/HRC/39/CRP.2, paras. 701-702. See also paras. 1133-1134.

²²⁶ A/HRC/39/CRP.2, para. 707. The newspaper Eleven Media claimed that the reported violence in Maungdaw was carried by the Rohingya terrorists, when in reality, the violence can be attributed to the Myanmar security forces.

²²⁷ A/HRC/39/CRP.2, para. 1328.

²²⁸ UA MMR 7/2015. The urgent appeal was made by the Special Rapporteur on the situation of human rights in Myanmar, the Special Rapporteur on minority issues and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance.

²²⁹ The Prosecutor v. Nahimana et al. (28 November 2007), para. 692 *et seq.*; Prosecutor v. Bikindi (2 December 2008), para. 247.

²³⁰ The Prosecutor v. Akayesu (2 September 1998), para. 556; Nahimana et al. (3 December 2003), para 1039.

campaign against the Tutsi. One of the radio moderators, Georges Ruggiu, was found guilty because of his statements during various radio programs²³¹ and a chief of an extremist newspaper, Hassan Ngeze, was convicted because of his statements²³². Further, singer Simon Bikindi was found guilty because of his song lyrics, which were held as incitements to commit genocide.²³³

Legal significance of hate speech, when it leads to committing genocide, may realize in the form of incitement. Incitement means, in the words of the ICTR, “encouraging or persuading another to commit and offence”.²³⁴ Article III(e) of the Genocide Convention states that direct and public incitement to commit genocide shall be punishable. The statutes of the international criminal tribunals also contain the same prohibition.²³⁵ This means that a separate form of complicity, inducing or attempt to induce, is criminalized. A completed or successful genocide is not required.²³⁶

Werle and Jessberger crystallize the relevance of hate speech in different situations. According to them, a rule of thumb can be found when examining incitement to genocide and the freedom of speech. That is, the more secure the internal peace among various groups of a society is, the less defamatory and discriminatory statements should be interpreted as direct incitements to commit genocide. In contrast, if the political and social climate is already divided and followed by violent tensions between the groups, the likelihood for such statements being used as incitement to genocide is bigger.²³⁷

4.5 Calling upon the competent organs of the UN

According to Article VIII of the Genocide Convention a contracting party may call upon the competent organs of the UN to take such action under the UN Charter as they consider appropriate for the prevention and suppression of acts of genocide or any other act enumerated in Article III of the Genocide Convention. The Article itself does not establish any concrete actions, so therefore a closer look into the content is in order.

²³¹ Prosecutor v. Ruggiu (1 June 2000), para.75.

²³² The Prosecutor v. Nahimana et al. (28 November 2007).

²³³ Prosecutor v. Bikindi (2 December 2008), paras. 417 *et seq.*

²³⁴ The Prosecutor v. Akayesu (2 September 1998), para. 555.

²³⁵ Rome Statute, Article 25 (e); ICTR Statute, Article 2(3)(c) and ICTY Statute 4(3)(c).

²³⁶ The Prosecutor v. Akayesu (2 September 1998), paras. 561-562.

²³⁷ Werle & Jessberger 2014, p. 324.

Firstly, the Article VIII does not confer to the UN organs any other functions or competence in addition to those already established in the UN Charter or in the Statute of the ICJ. This has been clarified by the ICJ.²³⁸ The nature of the Article VIII of the Genocide Convention is merely expository.²³⁹ Therefore, the focus is in Chapter VII of the UN Charter.

The UN member states have undertaken, among other things, to act in sovereign equality, ensuring that they will act in accordance with principles set out in Article 2 of the UN Charter for the maintenance of international peace and security. The justification for intervention can be found in Article 39 of the UN Charter, which provides that the UN Security Council shall determine the existence of any threat to the peace, breach of the peace or act of an aggression and shall make recommendations or decisions what measures are to be taken in accordance with Articles 41 and 42 of the UN Charter.

The UN Security Council has established that genocide is a threat to international peace and security.²⁴⁰ This triggers thus the applicability of the Articles 41 and 42 of the UN Charter. The former Article is the basis for measures not involving the use of armed force, such as economic or other sanctions or severance of diplomatic relations. The latter enables the possible military action among others.

So far, the UN High Commissioner for Human Rights, Zeid Ra'ad al-Hussein, has urged the UN Security Council to consider imposing sanctions on Myanmar.²⁴¹ Sanctions have been recommended by the Fact-Finding Mission also.²⁴² So far, the UN Security Council has not taken upon that task. Individual countries such as United States²⁴³, Australia²⁴⁴ and Canada²⁴⁵ have imposed sanctions such as asset freeze and travel bans to top Myanmar military generals.

The concrete effect of the sanctions is questionable and to be seen. It may be argued, however, that they may have had some effect in the past. Myanmar has been under the

²³⁸ Genocide case (Provisional Measures Order, 8 April 1993), para. 47. In the case, the applicant state invoked Article VIII of the Genocide Convention and called upon the ICJ to do immediately and effectively whatever it could to prevent and suppress the threat of genocide.

²³⁹ Gaja 2009, p. 400.

²⁴⁰ See for example S/RES/955, wherein the UN Security Council first states that the reports concerning Rwanda is indicating genocide and other systematic, widespread violations, and is thus of grave concern and therefore constitutes a threat to the international peace and security.

²⁴¹ BBC (September 2017).

²⁴² A/HRC/39/CRP.2, paras. 1666 *et seq.*

²⁴³ New York Times 2018.

²⁴⁴ ABC News 2018.

²⁴⁵ Reuters (June 2018).

sanctions before by the Western world, but they were eased when the military showed some willingness to make a democratic reform and hold elections and Aung San Suu Kyi was ultimately freed from the house arrest. As we have learned, the democratic focus has not been what the world thought. Quite the opposite, the country's "moral leader" Aung San Suu Kyi has turned her back to protecting civilians.²⁴⁶ Therefore, the option to use of force seems more decisive alternative.

International law is construed very much on the principle of the territorial sovereignty, which principle enjoys the *ius cogens* status. The said Article 2 (4) provides that:

[a]ll Members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Therefore, any act pursuant to Article 42 of the UN Charter is an infringement of that principle. This boils down to a very interesting question: as prohibition of genocide and territorial sovereignty are both *jus cogens* norms, which one wins? Ultimately, that is a battle for the UN Security Council to judge, as it is the one authorized, but not obliged, to allow the use of force.²⁴⁷

It should be, however, noted that invoking Article VIII of the Genocide Convention does not relieve states from their obligations to prevent under the Genocide Convention. States are still obligated to prevent or repress the commission of genocide as far as possible pursuant to the obligation to prevent. This has been stated by the ICJ in its 2007 judgment: "*Even if and when these organs have been called upon, this does not mean that the States parties are relieved of the obligation to take such action as they can to prevent genocide from occurring, while respecting the UN Charter any decisions that may have taken by its competent organs.*"²⁴⁸

²⁴⁶ A/HRC/39/CRP.2, para. 1548.

²⁴⁷ The wording of the Article 42 of the UN Charter is "[s]hould the Security Council **consider** that measures...would be inadequate... it **may** take such action..." (Emphasize added).

²⁴⁸ Genocide Case (Judgement 26 February 2007), para. 427.

5 PROTECTING AS RESPONSIBILITY

5.1 Sovereignty vs. human rights

When examining the reactions of the international community towards the man-made catastrophes, such as wars and other crises, the debate over sovereignty versus human rights emerges frequently.²⁴⁹ The Preamble of the UN Charter contains a very noble idea to reaffirm faith in fundamental human rights, but being put against the atrocities that have happened, it shows the political dilemma: in the case where human rights are neglected by a state, should sovereignty and its impact on politics be privileged over the rights of the individuals or should we have a possibility to override it in certain cases and permit intervention for the purpose of protecting these fundamental values?²⁵⁰

Base for sovereignty can be found from Article 2(7) of the UN Charter, which provides that the UN should refrain from interfering in matters which are essentially within the domestic jurisdiction of any state. This presumable is the legal basis for the declarations of Myanmar, which has in several contexts, with the support of Russia and China, stated that the ‘violence’ in the Rakhan State is purely a domestic matter.²⁵¹ This reasoning is familiar in other cases, too. For example, in 2005, when the UN Security Council debated on whether the crisis in Sudan should be referred to the ICC, the United States argued that such referral would breach the sovereignty and intervene in its internal affairs. What can be concluded from above is, that sovereignty and human rights are seen as opposite values.

Bellamy has examined the division of sovereignty into two concepts: traditional sovereignty and sovereignty as responsibility. Traditional sovereignty emphasizes the right to free-determination, whether, for example, in relation to culture or system of governance. There, the sovereignty is used as protection of the right to self-determination against interference in domestic affairs. Therefore, the threshold for such interference is set at high level.²⁵² When assessing this threshold, Bellamy states that the mass murder of 800,000 Tutsis in Rwanda would most likely exceed this high level.²⁵³ To compare, simply by figures, the killing of

²⁴⁹ Bellamy 2009, p. 19 *et seq.*

²⁵⁰ Bellamy 2009, p. 19 *set seq.*

²⁵¹ See, for example, UN Meetings Coverage 2018 and Statement by H.E. Mr Kyaw Moe Tun (2018).

²⁵² Bellamy 2009, pp. 15-18.

²⁵³ Bellamy 2009, p. 18.

10,000 Rohingya might therefore not. In that case, sovereignty of Myanmar would override any human rights concerns of the Rohingya. Obviously, for the victims, this would be unbearable.

The second concept of the sovereignty is sovereignty as responsibility, which has been inspired by Francis Deng. It entails the view that sovereignty is both rights and responsibilities. Simply put, the states that honor the human rights and protect their population are entitled to their sovereignty to the fullest. The foundation of this concept rests on two facts. Firstly, human rights are universal, irrevocable rights and they come before politics. Secondly, human rights are the primary responsibility of government in the protection of its population and if failed, international community will have the secondary right to protect.²⁵⁴ The concept of responsibility to protect is based on this view.

5.2 Responsibility to protect doctrine

5.2.1 Purpose and background

The doctrine of responsibility to protect (“R2P”) was a response to the wars, genocide, ethnic cleansing and other violence that took place in the different parts of the world in the 1990’s and to the subsequent deficiencies of international reactions to them.²⁵⁵ One of the catalysts that led into the doctrine, alongside the Rwandan and Balkan genocide, was the military intervention by the NATO in Kosovo as response to the wave of killings and forced expulsion after diplomacy and sanctions failed. Noteworthy, the military intervention was not authorized by the UN Security Council because of China’s and Russia’s vetos.²⁵⁶

The Canadian government established the ICISS to strengthen the role of the UN and its responses to the threats of global security. The ICISS launched in 2001 an initiative, which is known today as the R2P. The purpose of the R2P was to break a deadlock of the UN concerning humanitarian intervention by redefining the sovereignty of states in terms of their responsibility to protect their population. To strengthen that responsibility, in the case of a

²⁵⁴ Bellamy 2009, pp. 19-23.

²⁵⁵ ICISS Report, Foreword.

²⁵⁶ It was claimed that the humanitarian intervention did not have any legitimacy pursuant to the Chapter VII of the UN Charter or in the general principles of international law. See more, for example, Bellamy 2009, p. 29.

failure, the international community is entitled to take over that responsibility of an individual state.²⁵⁷ This coheres with the concept of sovereignty as a responsibility.

The fundamental question was, and seems to be still today, how should the international community respond to the situation where a state repeatedly breaches its obligations, suppress and abuse its population and is unwilling to prevent such behavior? At the 2005 high-level UN World Summit meeting, the member states of the UN introduced the answers to that question in the form of R2P.²⁵⁸

5.2.2 Legal basis of the R2P

In accordance with the R2P, the UN members have indeed declared to take collective action, in a timely and decisive manner through the UN Security Council should peaceful manners be inadequate and national authorities fail to protect their populations from genocide, crimes against humanity, ethnic cleansing and so on.²⁵⁹ According to Smith, this does not necessarily mean broadening the concept of legal norm of Genocide Convention, but it is a development of social norm of genocide.²⁶⁰

The gist of the matter is its non-binding status. No matter how welcomed the doctrine of R2P has been, the legal basis of the R2P still rests in the underlying obligations of the states under the existing international instruments such as the UN Charter, Genocide Convention and the developing case law of international tribunals. Albeit the fact that the resolution concerning the R2P was accepted by consensus, and the political support²⁶¹ can be found therein, the resolution is still recommendatory in its nature.²⁶² The content of the R2P should be thus examined against the contemporary international law.

Firstly, sovereignty has never meant that a state could act in its territory however it wanted. The emergence of universal human rights has provided evidence that such rights no longer

²⁵⁷ A/59/2005; Niemelä 2008, pp. 7-8; Gattini 2007, p. 698.

²⁵⁸ A/RES/60/1, paras. 138-139. The action to be taken is not generally decided but by case-by-case, and in cooperation with relevant regional organizations.

²⁵⁹ ICISS Report, p. 13.

²⁶⁰ Smith 2010, pp. 16-17.

²⁶¹ To learn more precisely how the R2P developed from the ICISS' mandate to High-Level Panel Report, the Report of the Secretary-General and lastly, to the Outcome Document of the 2005 World Summit, see Stahn 2007, pp. 102-110.

²⁶² According to the Article 10 of the UN Charter, the resolutions of the UN General Assembly are non-binding. Also, in accordance with the Article 38 of the ICJ Statute such resolutions do not fall under the classic sources of international law, those being international conventions, international custom, general practice accepted as law and general principles of international law.

are considered as domestic issues.²⁶³ Also, the establishment of international tribunals and emergence of universal jurisdiction have all contributed to the erosion of the traditional sovereignty.²⁶⁴ Therefore, the rationale of state sovereignty ends in favor of the state when its own population is being violated.

Secondly, the law of state responsibility recognizes that certain violations of international law affect all states and authorizes states to respond either through claims for cessation of wrongful act, demands of reparation or countermeasures. These all have been included in the ARSIWA by the ILC.²⁶⁵ Breaches of these Articles would entail the obligation of states to cooperate on bringing the breach to an end through lawful means and not render aid or assistance in maintaining the breach.²⁶⁶ The duty to cooperate under the ARSIWA entails coordinated effort by all states to counteract the breaches of peremptory norms of international law through framework of UN or other competent international organization.²⁶⁷ Also, before the adoption of the R2P the international community had already been somewhat acquainted with the obligation to cooperate and protect in the form of Article 1(3) and Article 44 of the UN Charter. As we can see, this is very close to the idea of collective responsibility under the R2P.

Thirdly, Chapter VII of the UN Charter already empowers the UN Security Council to act if there is “*a threat to the peace, a breach of the peace or an act of an aggression*”.²⁶⁸ Whether the conflict is determined to be an international armed conflict or ‘merely’ internal armed conflict, it would still constitute a threat to peace according to the ICTY, which has referred to the practice of the UN Security Council also in the cases of civil war or other internal conflicts.²⁶⁹ In that light, the view of the R2P being a re-characterization of the normative development of international law, or “old wine in new bottle”²⁷⁰ seems correct.²⁷¹ Further, although Niemelä raises the collective responsibility of the international community as a matter as novelty of the R2P at the time of its adoption and examines the *ius cogens* status of the crime of genocide in relation to state responsibility, a reference to the judgment of 2007 of the ICJ concerning the Balkan genocide is in order. To recall, there the court brought

²⁶³ Stahn 2007, p. 112.

²⁶⁴ Niemelä 2008, p. 20.

²⁶⁵ See Article 48(2) and Articles 49-53 of the ARSIWA 2001.

²⁶⁶ Articles 48(2) and 49-53 of the ARSIWA, commentary.

²⁶⁷ Article 41 of the ARSIWA, Commentary, para (3).

²⁶⁸ UN Charter, Article 39.

²⁶⁹ See Prosecutor v. Dusko Tadic (2 October 1995), para. 29.

²⁷⁰ Stahn 2007, pp. 111-117

²⁷¹ Niemelä 2008, p. 17.

up the wider scope of the obligation to prevent and the doctrine of due diligence that obligates all states.²⁷²

It has been brought up as regards to the authority to declare the failure to protect, that it should be an impartial party who places the interest of common good ahead of its inspirational aspirations.²⁷³ While addressing the weaknesses of the UN Security Council, the ICISS has also suggested that the UN Security Council should be the one making the decisions concerning overriding of state sovereignty.²⁷⁴ This is because of the UN Security Council already has the primary responsibility under the UN Charter for peace and security matters.²⁷⁵ All in all, even though the concept of the sovereignty as responsibility, and the doctrine of the R2P that followed it, entail the idea that human rights come before the politics, it seems that the encounter with politics is inevitable. Taken into consideration that Russia and China are commonly known as the countries who use their veto-rights the most, and would probably in the case of the Rohingya do so, such declaration would not be made by the UN Security Council. Therefore, the view of Bellamy is quite right when he argues that the more the UN Security Council is asked to adjudicate, the more its legitimacy is of importance.²⁷⁶

5.2.3 Prevention as an element of R2P

In accordance with the ICISS Report, the R2P entails three specific responsibilities: responsibility to prevent, responsibility to react and responsibility to rebuild. As has been established in the earlier Paragraphs of this Thesis, after the unauthorized NATO bombing of Kosovo, the international community hoped for clarification to the use of military intervention. Although the R2P contains principles relating to the use of force²⁷⁷, the ICISS elevated the responsibility to prevent as the most important dimension of the R2P, which responsibility shall always be exhausted before intervention is contemplated.²⁷⁸ This priority is based on two sets of issues: saving lives through prevention and shifting the attention on the debate concerning military interventions to the fact that effective prevention will reduce

²⁷² Niemelä 2008, p. 20; Genocide Case (Judgement 26 February 2018), para.

²⁷³ Niemelä 2008, p. 20.

²⁷⁴ ICISS Report 2001, paras. 6.13-6.14.

²⁷⁵ UN Charter, Chapter VII.

²⁷⁶ Bellamy 2009, p. 23.

²⁷⁷ See Chapter 5.2.4 of this Thesis.

²⁷⁸ ICISS Report 2001, p. xi.

the need for such military actions.²⁷⁹ When examining further, the R2P suggests early warning signs and their analysis together with political, diplomatic, economic, legal and military tools for the measures of prevention.²⁸⁰ When comparing these tools to the UN Framework for prevention, a similarity can be seen.²⁸¹

The ICISS strongly stated that R2P implies also obligation to prevent and that it was high time for the international community to act and close the gap between the rhetorical support and actual commitment.²⁸² The above-mentioned prioritizing of prevention has not been, however, greeted without criticism. Weiss seems to be a very loud one in his opinions. He argues that:

*“it is preposterous to argue that to prevent is the single most important priority; the most urgent priority is to react better. Most of the mumbling and stammering about prevention is a superficially attractive but highly unrealistic way to try and pretend that we can finesse the hard issues of what essentially amounts to humanitarian intervention.”*²⁸³

Weiss further emphasizes that although the ICISS succeeded to clarify the discourse on prevention, it left the situation blurred on the part of those who already are in the crosshairs of war.²⁸⁴ The R2P concentrates heavily to early warning signs and analysis thereof, efforts to prevent root causes and direct prevention.²⁸⁵ Turning back to Weiss’ critique towards prevention, he has a valid point, which has also been supported by other scholars.²⁸⁶ For example, focusing on the killing of 10,000 Rohingyas in that actual moment it is rather late, bluntly put, to stop the genocidal wheels from turning through diplomacy or examining root causes.

This raises the question what is the place that prevention, and rebuilding for that matter, take in the R2P concept? To answer, we are in crossroads with Weiss’ and Bellamy’s argument that prevention and rebuilding have been added to the concept of R2P to make military interventions more palatable to accept “as a part of the deal” in order to prevent future

²⁷⁹ Bellamy 2009, p. 53.

²⁸⁰ ICISS Report 2001, paras. 3.10-3.43.

²⁸¹ See Framework Analysis 2014.

²⁸² ICISS Report 2001, para 3.1.

²⁸³ Weiss 2007, p. 104. There are also views arguing that R2P is just another name for humanitarian intervention. See Evans 2008, p. 50.

²⁸⁴ Weiss 2007, p. 104.

²⁸⁵ ICISS Report 2001, pp. 21-27.

²⁸⁶ Bellamy 2009, p. 52.

Rwandas and Balkans. This, in turn, distracts and threatens the R2P's conceptual clarity as regards to the scope of military intervention.²⁸⁷

5.2.4 Military intervention as an element of R2P

The R2P implies also responsibility to react to crises of compelling need for human protection. External military interventions for the purposes of protecting human rights have been controversial both when they have happened and when they have not. The debate over such interventions seems to vary – some see it as a right for a good cause, others see it just justification for the illegal breach of principle of state sovereignty.²⁸⁸

Rwanda crisis in 1994 led to inaction, although some of the UN members were aware of the genocide planning by the government. There were plans, if not prevent but at least mitigate the effects of genocide, but the UN Security refused to take necessary action.²⁸⁹ Further, as regards to Sudan, due to, among others, flawed planning and poor execution, the prevention of the crisis was a failure.²⁹⁰ In the case of Kosovo, the bypassing of UN system and authorization of the UN Security Council led to the question, if all the peaceful means to resolve the conflict had been fully explored? There the reactions to the unauthorized action seems to have varied from illegal to legal, but there was also a reaction “illegal but legitimate”²⁹¹: how could the world stand by and let genocide take place because of the wording of the UN Charter, when all the diplomatic paths had been, allegedly, exhausted?²⁹²

The foreword of the ICISS Report starts by introducing the report being about “right of humanitarian intervention”, question of when it is appropriate to take coercive action, particularly in the military form. However, before getting to the point of military intervention, the R2P doctrine includes, in addition to preventive measures, measures short of military actions, such as sanctions affecting to military, economic, political and diplomatic areas.²⁹³ Sanctions as a preventive tool may come handy, at least when targeting the

²⁸⁷ Bellamy 2009, p. 52.

²⁸⁸ ICISS Report 2001, Foreword. Schabas has called the use of force as a justification for military intervention as one of the features of genocide mystique. This was said in reference to the bombings of Kosovo in 1999. See Schabas 2012, p. 117.

²⁸⁹ ICISS Report 2001, p. 1.

²⁹⁰ ICISS Report 2001, p. 1. Evans, however, argues, that the whole R2P did not fail, it was rather the estimates on the balance of consequences. See Evans 2008, p. 61.

²⁹¹ The Independent International Commission on Kosovo 2000, p. 4.

²⁹² ICISS Report 2001, para. 1.2.

²⁹³ ICISS Report 2001, paras. 4.3 *et seq.*

individual perpetrators, but large-scale economic sanctions may worsen the situation and be more burdensome to the civilians than to the principal players in the genocidal acts.²⁹⁴

The ICISS has recognized six criteria for military intervention: right authority, just cause, right intention, last resort, proportional means and reasonable prospects.²⁹⁵ Just cause implies that military intervention is reserved for, firstly, large scale of loss of life, with genocidal intent or not, which is related to the territorial state either by deliberate actions, neglect or failure to act, and secondly, large scale ethnic cleansing as further defined in the ICISS Report. Naturally, this criteria is not immune to interpretation and to questions of evidence, either.²⁹⁶

Evidence-wise, it seems that before invoking military intervention, it must be proven in each case that there is actual or threatened large scale human loss or ethnic cleansing taking place.²⁹⁷ That requires fair and accurate information. This then leads to the situation that report of a fact-finding mission is needed or information should be otherwise gathered by the UN organs and agencies. The challenge is that there might not be time for it.

As for the other criteria, they seem to target the legitimacy of the military intervention (right intervention), which can be ensured by collective decision and support, scale and intensity of the military intervention (proportional means) to secure the humanitarian objective with minimum intervention as possible in succeeding to achieve the goal (reasonable prospects).²⁹⁸ All in all, there seems to be a long path from preventive measures to actual military intervention.

5.3 Significance of the R2P in practice

Despite of R2P, the norm of non-intervention is still the starting point. According to the ICISS Report, the rule against intervention to internal matters encourages the states to solve their own internal conflicts so that they do not form a threat to international peace and security.²⁹⁹ The distinction between primary responsibility of the territorial state and the

²⁹⁴ ICISS Report 2001, para. 4.5.

²⁹⁵ ICISS Report 2001, para. 4.15.

²⁹⁶ ICISS Report includes further examination of what is meant by 'large scale' for example. See ICISS Report 2001, paras. 4.21-4.27.

²⁹⁷ ICISS Report para. 4.28.

²⁹⁸ ICISS Report 2001, paras. 4.33-4.43.

²⁹⁹ ICISS Report 2001, para. 3.2.

secondary responsibility of the international community entails complementarity, which may turn into trap according to Stahn. The collective responsibility will only take place if the national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing or crimes against humanity. What is meant by ‘manifestly fails’ is left unclear. There is also the risk that the primary responsibility is used as an excuse to decline the secondary responsibility by arguing that the international community is not either competent or entitled to intervene or the intervention is premature³⁰⁰. Further, the implications of inaction, whether by the territorial state or the international community, is also missing from the R2P. Also, there are no implication what non-compliance would mean for the UN Security Council. This also emphasizes the fact that the R2P is more a political principle than legal one.³⁰¹

Another issue that has been brought up by Evans, is the argument that R2P only applies to weak and friendless countries, and never the strong. For example, if the crisis at hand would concern the permanent members of the UN Security Council, the fear is that the veto powers would block the use of R2P.³⁰² Further examining this argument, he, however, concludes that in today’s world no country, no matter how big and powerful, would be immune to peer group pressure and that the concern of losing the international image would contribute to the problem solving more effectively.³⁰³ This argument has not worked in the case of Myanmar, which has had China and Russia as strong supporters in the debated that the Rohingya crisis is just internal violence.³⁰⁴

The abovementioned issue has been recognized by the ICISS as well. In its report, it duly noted the veto powers of the UN Security Council members and suggested a “code of conduct” for the use of veto with respect to actions required to halt or avert a significant humanitarian crisis, at least in matters where there are no vital national interests involved.³⁰⁵ Notwithstanding with the concern of veto powers, the ICISS however believed the UN Security Council was the right authority to deal with military intervention issues for human protection purposes.³⁰⁶

³⁰⁰ Stahn 2007, p. 117.

³⁰¹ Stahn 2007, pp. 117-118.

³⁰² Evans 2008, pp. 61-64.

³⁰³ Evans 2008, p. 63.

³⁰⁴ SC/13552.

³⁰⁵ ICISS Report 2001, paras. 6.20-6.21.

³⁰⁶ ICISS Report 2001, paras. 6.13-6.14.

So far, the examples of R2P being used concentrate mostly to the African continent. In practice, the first time when the UN Security Council officially referred to the R2P was in April 2006 in its resolution.³⁰⁷ Further, referring to said resolution the UN authorized its peacekeeping troops to Darfur.³⁰⁸ Later, the R2P has been referred to in the conflict in Libya in 2011, which also led to the NATO strikes against Qadhafi's forces, in Côte d'Ivoire in 2011, which led to the military operation by the UNOCI and in Syria in 2012.³⁰⁹

Although use of force can be a powerful tool for solving crises, they may have repercussions as well. As Niemelä points out, interventions can also increase and accelerate the violence or other potential hazards, prolong and escalate the conflict so that it will endanger the conditions of the people that it is designed to help.³¹⁰

6 PUNISHING GENOCIDE

*"I do not see any justice for us. Justice was never there in Myanmar. It is just that now the situation is more in focus because of the extreme levels of the violence."*³¹¹

6.1 Purpose of punishment

The link between the protection fundamental values of international community and legal order is international criminal law. In international criminal law, the purpose of punishment is "borrowed" from the ordinary domestic criminal law: it serves justice and retribution. In addition, the preventive element of punishment, deterrence, is important.³¹²

This has been the view of the UN Security Council as well. It stated, when creating the ICTY, that the prosecution and punishment of the perpetrators would contribute to preventing future crimes.³¹³ This has been seconded by the ICTY itself by stating in *Kupreskic et al.* case that "[t]he Trial Chamber is further of the view that another relevant

³⁰⁷ S/RES/1674.

³⁰⁸ S/RES/1706.

³⁰⁹ Tsekkaa tähän resot <http://www.un.org/en/preventgenocide/rwanda/about/bgresponsibility.shtml>.

³¹⁰ Niemelä 2009, p. 23.

³¹¹ A/HRC/39/CRP.2, p. 395. The Report cites a victim heard while gathering evidence.

³¹² Drumbl 2007, p. 11. See also, Prosecutor v. Stakić (31 July 2003), para. 900; Prosecutor v. Nikolic (2 December 2003), para. 90.

³¹³ S/RES/827.

*sentencing purpose is to show the people of not only former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes.*³¹⁴” However, taking into consideration that the punishment of the perpetrators takes place in the aftermath of the genocidal acts, May has questioned, whether holding criminal trials is the best way to gain reconciliation and the return to the rule of law instead of truth and reconciliation commissions.³¹⁵

As in criminal law in general, also the international criminal law acknowledges two forms of preventive effects: positive general prevention and positive special prevention. For example, the Rome Statute, pursuant to which the ICC was established, states that the aim of the ICC is to “*put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes*”.³¹⁶ This means contribution to stabilize the norms of international law to the extent that the punishment is understood as a fact that international law is law and any breaches will be punished. The target of the positive special preventive effect, in turn, is an individual (potential) perpetrator itself.³¹⁷

Werle and Jessberger brings up two other specific effects of prosecuting crimes under international law. First, the trials have a truth-seeking aspect. Convictions constitute an official acknowledgement of injustice and of victim’s suffering. Secondly, prosecutions individualize the responsibility. There, it is not the abstract entities that commit the atrocities, it is the collaboration of real people. Individualization gives faces to the perpetrators, observes their individual acts so that they cannot hide behind the curtain of a state machinery. Werle and Jessberger calls it refuting the idea of collective responsibility.³¹⁸

The critics of the international tribunals have targeted the fact that judgments are of retroactive nature: decisions of prosecution are often made when the crisis is already underway, or even when the crime is committed. This kind of retroactivity is not, however, deviant from the process at the domestic level, when considering, for example, a murder. What is different, is that in the field of international criminal law, the national law prohibiting genocide may not be in place or the jurisdiction of the ICC is not applicable to the matter at hand.³¹⁹ This is the case with Myanmar, as will be later established.

³¹⁴ Prosecutor v. Kupreskic (14 January 2000), paras. 848-849.

³¹⁵ May 2010, p. 8. This question was raised, particularly, in relation to the Rwandan genocide.

³¹⁶ Rome Statute, Preamble (5).

³¹⁷ Werle & Jessberger 2014, paras. 111-112

³¹⁸ Werle & Jessberger 2014, paras. 111-112. See also para. 123.

³¹⁹ Schabas 2012, p. 4.

6.2 Enacting national legislation

In a decentralized international legal system, domestic implementations of criminal acts lie in the frontline in the combat against genocide.³²⁰ In accordance with Article V, the contracting parties are obliged to give effect to the provisions of the Genocide Convention and provide effective penalties for the persons guilty of the acts prohibited by the Convention.³²¹ The problem with this Article is that the Genocide Convention does not have any supervision on the state fulfilling nor not this obligation.³²²

In the *Genocide* case the ICJ examined the questions relating to Article V of the Genocide Convention. There the court observed that “undertake” as a term means giving formal promise, agreeing and accepting an obligation.³²³ Therefore, understandably, the court found that breach of the obligation under Article V and related provisions invokes state responsibility. This was the conclusion also in the case of not prosecuting and extraditing alleged offenders.³²⁴

As Myanmar has ratified Genocide Convention, it is under an obligation to criminalize, in accordance with its Constitution, genocide under its domestic laws. According to the report of the Fact-Finding Mission, neither genocide nor crimes against humanity have been criminalized specifically in Myanmar.³²⁵ Further, the Constitution of Myanmar is problematic particularly in relation to the fact that the Rohingya are *de facto* stateless – it serves human rights protection only to citizens. The power and influence of the military forces has an effect these practices and weakens the judicial administration and the investigations relating to alleged crimes even more.³²⁶

³²⁰ Werle & Jessberger 2014, para. 80.

³²¹ According to Saul, at widest, the necessary scope of this obligation would contain the incorporation of Articles I-IV and Articles VI-VIII of the Genocide Convention into domestic law. See Saul 2007, pp. 61-62.

³²² See the Genocide Convention.

³²³ *Genocide* case (Judgement of 26 February 2007), para. 162.

³²⁴ *Genocide* case (Judgement of 26 February 2007), para. 159.

³²⁵ A/HRC/39/CRP.2, p. 401. The Report states that even those serious crimes that are included in the domestic Penal Code of Myanmar, are not definition-wise in compliance with international norms and standards. For example, the provisions for rape and sexual violence are restrictive.

³²⁶ A/HRC/39/CRP.2, p. 402. The Report reveals that the Myanmar Police Forces have a connection to the military forces and when acting on joint missions, the police forces are under the command of Tatmadaw.

6.3 International criminal jurisdiction over genocide

6.3.1 Territorial jurisdiction

According to Article VI of the Genocide Convention, persons charged with genocide shall be tried by a competent tribunal of the territorial state of which the act was committed, or by such international tribunal that has jurisdiction with respect of the contracting parties to the Genocide Convention, which have accepted the jurisdiction.³²⁷ The Genocide Convention therefore suggests territorial jurisdiction as a first instance.

The principle behind the territorial jurisdiction is that every state has the authority to define the scope of its national criminal jurisdiction as a part of the state sovereignty. This has, however, created problems. Due to the concept of sovereign power and the principle of non-interference, mass atrocities, however illegal, have been long unpunished as the enforcement had been left to the territorial state. Territorial jurisdiction is not seen, therefore, the most successful mean to bring justice, as the crime of genocide is often state-sponsored by the government against its own civilians and has therefore led to impunity.³²⁸

What comes to the punishment of crimes and violations executed against the Rohingya, the reality is that up to the date of the Report of the Fact-Finding Mission, no actions have been taken towards ensuring accountability by Myanmar.³²⁹ So far, Myanmar has stated that it will act against anyone if there is sufficient evidence presented.³³⁰ Myanmar's position is, however, lacking grounds. According to the Mission, the duty to ensure accountability is not linked to the presentation of sufficient evidence by others. Myanmar is and has been, therefore, under the obligation to promptly, thoroughly, independently and impartially to investigate all allegations and gather evidence so that it does not get destroyed or lost.³³¹

³²⁷ Genocide Convention, Article VI.

³²⁸ Reydam's 1996, pp. 20-22.

³²⁹ A/HRC/39/CRP.2, p. 395.

³³⁰ Statement by H.E. Mr. Kyaw Moe Tun (2018), p. 3.

³³¹ A/HRC/39/CRP.2, p. 395.

6.3.2 Universal jurisdiction

“International crimes are not domestic matters”.³³² The reasoning behind that statement is that the effects of crimes directed against the most elementary values of the international community cannot be limited to the domestic realm of a state where the crime was committed.³³³

Under international law, the question of authority to prosecute and punish crimes, is one of hierarchy. The feasibility and principle argue for the primary obligation of a directly affected state.³³⁴ In the context of the territorial jurisdiction, as it can be concluded from the statements of Myanmar, the impunity at the domestic level is not, most likely, achieved, and so the accountability must be established from the international level.

The establishment of the two *ad hoc* tribunals in the former Yugoslavia and Rwanda has developed the international criminal law as the jurisdiction of both tribunals is based on the right of all states to assert jurisdiction over the alleged atrocities on the ground of universal jurisdiction.³³⁵ Because of that, judicial bodies in third states have asserted jurisdiction over crimes committed in the former Yugoslavia and Rwanda.³³⁶ For example, as regards to the former Yugoslavia, Denmark and Switzerland have prosecuted perpetrators.³³⁷

There is, however, some debate whether the crime of genocide is subject to universal jurisdiction because of the wording of Article VI of the Genocide Convention. The said Article provides that:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

³³² Werle & Jessberger 2014, para. 215.

³³³ Werle & Jessberger 2014, para. 215.

³³⁴ Werle & Jessberger 2014, para. 101.

³³⁵ See Statute of ICTY and Statute of ICTR.

³³⁶ Reydam 1996, p. 18.

³³⁷ Reydam 1996, p. 18.

As the universal jurisdiction has not been mentioned in the Article VI of the Genocide Convention, it could be argued that the territorial jurisdiction is exclusive.³³⁸ This does not, however, hinder the applicability of universal jurisdiction.

The ICJ has stated in its judgment of 1996 that the contracting parties to the Genocide Convention have expressly agreed to the wording of Article I of the Genocide Convention and therefore, they acknowledge that genocide is a crime under international law, which they must prevent and punish independently of the situation in which genocide takes place. The ICJ further stated that the Genocide Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided that the acts committed are those enumerated in Articles II and III of the Genocide Convention. In other words, whether the conflict is domestic or international, the obligations of the state parties stay the same.³³⁹

All in all, universal jurisdiction is welcomed. It serves a complementary mean to end impunity and creates comprehensive network of jurisdictional claims for international claims. Albeit some dangers, such as abuses of international legal system via (politically loaded) interventions and growing number of possible competing prosecution claims, excessive domestic prosecutions have not yet occurred. The key matter to keep in mind, is that the purpose of universal jurisdiction is to avoid loopholes in the prosecution of international crimes, such as genocide. This aim both adequately justifies and restraints the use of universal jurisdiction. It respects the state sovereignty as it does not replace primary jurisdiction, it is more of a “last resort”. Only if the territorial jurisdiction is unwilling or unable to prosecute, third states may initiate prosecution based on universal jurisdiction.³⁴⁰ In addition, the validity of the universal jurisdiction is acknowledged under customary international law for genocide.³⁴¹

³³⁸ The draft of the UN Secretary-General endorsed the universal jurisdiction to be included in Article VI of the Genocide Convention. This was, however, seen as a threat to the sovereign prerogative of states to prosecute crimes that had been committed in their territory. Various state delegates were of an opinion that the universal jurisdiction might be used as a tool for political motivated prosecutions and that third-party states would have challenges to obtain witnesses and evidence. See, for example, Lippman 1998, pp. 461-462.

³³⁹ Application of Genocide Convention (Judgement of 11 July 1996), paras.30-31.

³⁴⁰ Werle & Jessberger 2014, paras. 223–225.

³⁴¹ See, for example, Werle & Jessberger 2014, para. 218. In Tadic case, the ICTY stated that “[f]urthermore, one cannot but rejoice at the thought that, universal jurisdiction being nowadays acknowledged in the case of international crimes, a person suspected of such offences may finally be brought before an international judicial body for a dispassionate consideration of his indictment by impartial, independent and disinterested judges coming, as it happens here, from all continents of the world.” See Prosecutor v. Dusko Tadic (2 October 1995), para. 62.

Enabling the setting up of an international criminal tribunal by the Convention can be seen both as a necessity when the territorial courts would not prosecute, and as an alternative judicial body in the cases where the territorial court would not be able to try the perpetrators.³⁴² For almost fifty years, there was no international tribunal in the meaning of Article I of the Genocide Convention. This changed in the 1990s through the establishment of ICTY and ICTR by the UN Security Council. After the establishment of some quasi-international tribunals, the statute of the ICC was adopted in 1998.³⁴³ Also, the Report of the Fact-Finding Mission suggested that the case of the Rohingya should be examined by the ICC.

6.4 Invoking individual liability

Under general international law, the violations of such law can only affect the state, not the individual. To compare, the international criminal law differs from the above by individual liability. International criminal law thus provides the set of international rules designated to proscribe international crimes and the obligation of states to prosecute and punish those crimes.³⁴⁴ The relevant treaties and conventions, such as the Genocide Convention, focus on prohibiting certain acts, rather than addressing directly their criminal consequences. Although the Statutes of international criminal tribunals establish various classes of crimes that are punished, those are rather seen as classes over which the respective court has jurisdiction than as a criminal code.³⁴⁵

The Nuremberg trials after the Second World War is considered as a turning point for the development of individual criminal responsibility. There the tribunal made the infamous statement that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”³⁴⁶ Therefore, the Genocide Convention is considered to have continued to ensure the criminal accountability of persons committing genocide.³⁴⁷

³⁴² Zappalà 2007, p. 260.

³⁴³ Werle & Jessberger 2014, para. 80.

³⁴⁴ Milanović 2006, p. 554.

³⁴⁵ See Statute of ICTY, Statute of ICTR and the Rome Statute.

³⁴⁶ Cited by Milanović, see Milanović 2006, p. 553.

³⁴⁷ Gaeta 2007, p. 634.

The ICC carries a promise for international justice and is considered as having a pivotal role in the strengthening and developing international criminal liability after the ICTR and the ICTY.³⁴⁸ Likewise the ad hoc tribunals, the Rome Statute also acknowledges the individual criminal liability. According to Article 25 of the Rome Statute, person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment with the Statute. As it can be seen from the said Article, the individual criminal liability does not only attach to those who commit the crime but also to those who facilitate the commission by, for example, aiding and abetting.³⁴⁹ Moreover, Article 27 of the Rome Statute establishes that the official position of the perpetrator shall not relieve the criminal responsibility of such persons nor mitigate the punishment. Therefore, no matter at what level the person is in hierarchy, the criminal responsibility cannot be avoided.

In its Report, the Fact-Finding Mission argued for charging the Myanmar military leaders, Commander-in-Chief Senior-General Min Aung Hlaing and five other commanders, for genocide, as the events could not have happened without the knowledge of military leadership and their effective control. By naming the highest level of command, the Fact-Finding Mission is seeking to underline their responsibility for crimes committed.³⁵⁰

6.5 International Criminal Court

6.5.1 Role of the ICC

After the entry into force of the UN Charter, the states committed in the Genocide Convention to the establishment of an “international penal tribunal”.³⁵¹ Also, the genocidal events around the world have verified the need for a permanent international criminal court. In the absence of such court, many of the atrocities have left unpunished. The establishment of the ICC responded to that need.³⁵²

It can be concluded that the existence of the ICC is thus an objective fact. The UN member states have agreed to reaffirm their commitment to the rule of law and its fundamental

³⁴⁸ Slade 2007, p. 155.

³⁴⁹ Rome Statute, Article 25(3).

³⁵⁰ A/HRC/39/CRP.2, paras. 1554-1555.

³⁵¹ Decision ICC-RoC46(3)-01/18-37, para. 40.

³⁵² Werle & Jessberger 2014, paras. 56-72.

importance for political dialogue and cooperation among the international community. The states have committed to investigate, appropriately sanction and bring the perpetrators to justice through national, regional or international mechanisms in accordance with the international law.³⁵³ The UN Security Council has also emphasized the states' responsibility to comply with their obligations to end impunity to "*prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation*".³⁵⁴

The most significance distinction between the ICC and other international criminal institutions is the Prosecutor's freedom to elect what "situations" are taken for investigation and trial. This is called the *proprio motu* of the Prosecutor.³⁵⁵ To compare, the scopes of the ICTY and ICTR jurisdiction, respectively, have been designated by the UN Security Council, namely being the genocidal acts within the Bosnian and Rwandan territory. According to Schabas, the ICC has been created with autonomous authority to identify those crisis and conflicts to which it focuses. As Meron states, the international community needed a uniform and definite corpus of international law that was not dependent of politics and which scope was international atrocities everywhere and which recognized the role of all states in the vindication of such law.³⁵⁶ The only political factor lies in the hands of the UN Security Council, if it decides to refer a situation the Prosecutor.³⁵⁷

In the Rohingya case, the first and primary responsibility to investigate and prosecute crimes under international law lies with the national authorities of Myanmar. Recurrent statements of Myanmar and evidence gathered by the Fact-Finding Mission have, however, proven that Myanmar is unwilling to engage any such process.³⁵⁸ As the criminal accountability at the domestic level will not be achieved, it is the task of the international community to come forward. Justifications for international trials are both deontological and practical. On one hand, as atrocity crimes affect the international community as a whole, they should be condemned internationally. On the other hand, international crimes usually create security concerns, threat regional stability and cause cross-border movement by the refugees. National courts can also be politized, corrupted or biased.³⁵⁹ This is also accurate in the case of the Rohingya. The Report of the Fact-Finding Mission clearly establishes that the national

³⁵³ A/RES/67/1.

³⁵⁴ S/PRST/2010/11.

³⁵⁵ Article 15 of the Rome Statute. See also Schabas 2012, p. 86.

³⁵⁶ Meron 1995, p. 555.

³⁵⁷ Schabas 2012, p. 17.

³⁵⁸ A/HRC/39/CRP.2, paras. 3, 19, 116, 402.

³⁵⁹ Drumbl 2007, p. 6.

authorities have been involved in the discrimination and have repeatedly left the breaches of human rights unpunished.³⁶⁰

6.5.2 Jurisdiction of the ICC

To recall the content of Article VI of the Genocide Convention, it states that persons charged with genocide shall be tried by, in addition to the territorial one, such international penal tribunal as may have jurisdiction with respect to the contracting parties that have accepted its jurisdiction.³⁶¹ The question is, does the ICC then fulfill the requirement in the Genocide Convention?

Judge Marc Perrin de Brichambaut took a stand on this matter in his Minority Opinion by affirming that the ICC constitutes an international penal tribunal in the meaning of Article VI.³⁶² He found support to his view from the ICJ's *Genocide* case, where the court held that "notion of an 'international penal tribunal' within the meaning of Article VI must at least cover all international criminal courts created after the adoption of the Convention (at which date no such court existed) of potentially universal scope, and competent to try the perpetrators of genocide or any of the other acts enumerated in Article III."³⁶³ Although, in that case, the ICJ was examining the role of ICTY, judge de Brichambaut concluded that, as the Rome Statute contains the exact same definition of genocide as Article II of the Genocide Convention, it qualifies as an international penal tribunal within the meaning of Article VI of the Genocide Convention.³⁶⁴ Therefore, as being a permanent institution, the ICC has the capacity to investigate immediately when its jurisdiction is triggered.

To examine the jurisdiction of the ICC, the answer is found from Article 13 of the Rome Statute. According to said Article, the ICC may exercise its jurisdiction with respect to a crime in three cases: firstly, if a situation is referred to the Prosecutor by a state party (Article 13(a)), secondly, if the situation is referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter (Article 13(b)) and thirdly, if the Prosecutor has

³⁶⁰ A/HRC/39/CRP.2, paras.1574 *et seq.*

³⁶¹ Genocide Convention, Article VI.

³⁶² Minority Opinion ICC-02/05-01/09-302-Anx, paras. 11-18.

³⁶³ Genocide Case (Judgement of 26 February 2007), paras. 444-445.

³⁶⁴ Minority Opinion ICC-02/05-01/09-302-Anx, para. 13.

initiated an investigation in respect a crime in accordance with Article 15 of the Rome Statute (Article 13(c)).

There are, however, preconditions on the use of such jurisdiction as set in Article 12 of the Rome Statute. Articles 13(a) and 13 (c) state that in order for the ICC to use its jurisdiction, if one or more of following states are either parties to the Rome Statute or have accepted its jurisdiction: the state on the territory of which the crime is committed or the state of which the person accused of the crime is a national. This implies that compared to state referral and Prosecutor's *proprio motu*, the referral of the situation by the UN Security Council creates jurisdiction.

The problem that arises with the Rohingya crisis is that, as at the date, Myanmar is not a party to the Rome Statute³⁶⁵, and based on its statements concerning the crisis, neither it will most likely accept the jurisdiction of the ICC, although it has been one of the suggestion of the Fact-Finding Mission.³⁶⁶ Therefore, noting the wording of Article 12 of the Rome Statute, it seems that the only alternative to bring the perpetrators to ICC would be the referral of the situation by the UN Security Council to the Prosecutor of the ICC.

6.5.3 Jurisdiction on the base of referral by the Security Council

As it has been established in the previous chapter, the jurisdiction of the ICC, in general, is restricted to crimes committed within the territory or by a national of either state party or a state that has accepted the jurisdiction of the ICC in a particular case. In addition to situations described above, the ICC can exercise jurisdiction, pursuant to Article 13(b) of the Rome Statute, if a situation, in which crimes enumerated in Article 5 are committed, is referred to the Prosecutor by the UN Security Council acting under Chapter VII³⁶⁷ of the UN Charter. The jurisdiction of the ICC on these matters therefore targets the crimes committed on the territory of non-party states. Although the situation is referred to the ICC by the UN Security Council, the *ratione temporis* of the ICC is still limited to crimes committed after the entry of the force of the Rome Statute (1 July 2002).³⁶⁸

³⁶⁵ See

https://asp.icccpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx. Last visited: 18 December 2018.

³⁶⁶ A/HRC/39/CRP.2, p. 418.

³⁶⁷ Chapter VII of the UN Charter deals with “Action with respect to threats to the peace, breaches of the peace, and acts of aggression”.

³⁶⁸ This is subject to Article 124 of the Rome Statute.

As the ICC is not created by the UN Security Council, it is, in principle, free from the control and politics of the permanent members of the UN Security Council. But in the case of referral, the jurisdiction of the ICC therefore flows from the powers of the UN Security Council, which may take any authoritative action as regards to any UN member state in order to maintain and secure peace.³⁶⁹

What is noteworthy, that the UN Security Council is not obligated to refer cases to the ICC pursuant to the Rome Statute, it cannot empower or mandate the UN Security Council to do anything.³⁷⁰ It is thus a possibility. The wording of Article 13 of the Rome Statute provides that firstly, there is a certain threshold to referrals as the “one or more crimes” is required to have been committed and secondly, that the UN Security Council acts under the Chapter VII of the UN Charter. Pursuant to Article 39 of the UN Charter, the Security Council may decide the measures taken if there is a threat to peace. Moreover, even if the UN Security Council decides on the referral, the Prosecutor still holds the *proprio motu* in the situation and is not obligated to proceed. This refusal may be executed on the basis that the investigation or prosecution would be in contrary of justice.³⁷¹

After what has been examined by this Thesis, it is safe to say that genocide fulfills the threshold of Article 13 for the referral. Genocide is a large-scale crime which is committed with special intent, considered even by the ICC as one of the most serious crimes of concern of the international community and a threat to peace in accordance with the UN Charter. The problem with the referrals by the UN Security Council seems not be the excess use of it, rather it is the non-action or late-action, as in the case of Sudan.³⁷²

Considering that the UN Charter give to the UN Security Council primary responsibility to protect international peace and security³⁷³, it could be argued that the UN Security Council should act when there is a threat to peace, breach of peace or acts of aggression in accordance with Article 39 of the UN Charter. This is not, however, the case.

³⁶⁹ Werle & Jessberger 2014, para. 271.

³⁷⁰ Trahan 2013, p. 425. As Trahan points out, one of the purposes of the UN is, however, to promote and respect human rights.

³⁷¹ If refusal occurs, the Prosecutor may be called before the Pre-Trial Chamber of the ICC to justify its refusal in accordance of the Article 53 of the Rome Statute. On the notion of “in contrary of justice” and its consequences, see more Schabas 2012, pp. 86-88.

³⁷² Trahan 2013, p. 421.

³⁷³ UN Charter, Article 24.

The Fact-Finding Mission recommended in its Report that the UN Security Council would refer the situation in Myanmar without delay.³⁷⁴ At the moment, this seem quite unlikely based on the following lack of unanimity. There have been, however, efforts made to pursuit the referral. In October 2018, the Head of the Fact-Finding Mission addressed the UN Security Council to reiterate the findings, conclusions and recommendations of the Report. The briefing of the UN Security Council was, however, preceded by a procedural vote after receiving objections from China and Russian Federation among few others. The result was, that the briefing was approved by nine votes in favor. Among others, United States, France and United Kingdom were states affirming that massive destruction had taken place in Myanmar, which had relevance to the international peace and security. China and Russia were, unsurprisingly, against it.³⁷⁵ These responses mirror their reactions which had come forth already in the media earlier.³⁷⁶ When examining the of the standings of China and Russian Federation further, it can be concluded from their Press Releases that they were grounding their objection on the initiatives and progress being made to resolve the country-specific problems in the Rakhine State by those engaging with the Myanmar Government. These facilitators include China, who has acted as link between Myanmar and Bangladesh.³⁷⁷

China's and Russia's support for Myanmar has not been unnoticed by the international community. For example, the diplomatic pressure of the China against Bangladesh and Myanmar is due to the fact that it has economic and geostrategic interest in Myanmar and is also a major investor in Bangladesh.³⁷⁸ Russia, in turn, has brought up several times that it seconds the Myanmar government's view that the Fact-Finding Mission's Report is "raw and biased" and that the situation should be solved though bilateral negotiations between Myanmar and Bangladesh. Interestingly, also the double administrative work of the UN organs was brought up in the objections.³⁷⁹

³⁷⁴ A/HRC/39/CRP.2, para. 1651.

³⁷⁵ SC/13552. The objection was made by Bolivia, China, Equatorial Guinea and the Russian Federation. However, in the vote Equatorial Guinea in addition to Ethiopia and Kazakhstan abstained.

³⁷⁶ See <https://www.theguardian.com/world/2017/dec/24/china-russia-oppose-un-resolution-myanmar-rohingya-muslims>. Last visited: 18 December 2018.

³⁷⁷ See <https://sputniknews.com/europe/201811101069678104-china-bangladesh-rohingya-repatriation-help/>. Last visited 18 December 2018.

³⁷⁸ Report of the International Crisis Group 2018.

³⁷⁹ SC/13552. Representative of the Russian Federation stated that the Report of the Fact-Finding Mission had already been discussed in the Third Committee of the UN General Assembly (Social, Humanitarian and Cultural Issues), so the task of the Security Council would be a duplication of work.

Even though the findings of the Fact-Finding Mission are now being supported by the United States, France and United Kingdom – all three being permanent members of the UN Security Council – there are still China and the Russian Federation that can use their veto powers in the discussions that may follow and protect Myanmar from any action. This is also what the media suspects to happen.³⁸⁰

However, referring the Rohingya case to the ICC would not be the first time that the UN Security Council has used this right. Upon establishing the report on violations of international humanitarian law and human rights law in Darfur, the International Commission of Inquiry also called for prosecution of the crimes. As in the case of Myanmar, Sudan was not a party to the Rome Statute, and thus the suitable mechanism to trigger the jurisdiction of the ICC was referral pursuant to Article 13(b) of the Rome Statute.³⁸¹ In relation to Rohingya crisis, should the UN Security Council decide on referral, the Prosecutor would unlikely use its *proprio motu* to refuse such referral. As the following chapter will establish, the Prosecutor has already indicated the interest on the Rohingya crisis.

6.5.4 Prosecutor's request to investigate concerning the Rohingya case

In accordance with Article 19(3) of the Rome Statute, the Prosecutor may use its *proprio motu* and seek a ruling from the court regarding a question of jurisdiction or admissibility of the court. In the Rohingya case, the Prosecutor used this possibility and filed a Request pursuant to the said Article. The Prosecutor's aim was to seek a ruling from the Pre-Trial Chamber whether the ICC could exercise jurisdiction based on Article 12(2)(a) of the Rome Statute.³⁸² Somewhat surprisingly, the focus of the Prosecution's Request was the deportation³⁸³ of the Rohingya people across the international border from Myanmar into Bangladesh. While the Prosecution's Request acknowledged the fact that relevant deportations have taken place on the territory of Myanmar, which is not a party to the Rome Statute, it manifested that the jurisdiction of the ICC could, however, be invoked on the basis

³⁸⁰ Reuters (October 2018).

³⁸¹ S/RES/1593.

³⁸² Request ICC-RoC46(3)-01/18-1, paras. 1 and 63.

³⁸³ Deportation is included in Article 7(1)(d) of the Rome Statute as one of the crimes against humanity over which the ICC has jurisdiction. In accordance with Article 7(2)(d), deportation means enforced displacement of individuals across an international border. It has been recognized as crime against humanity also in the statutes of ICTY and ICTR. See more, Request ICC-RoC46(3)-01/18-1, paras. 13-17.

that the essential legal element of the crime, namely crossing the border, occurred on the territory of Bangladesh, which is a party to the Rome Statute.³⁸⁴ The Prosecution's Request referred to Article 12(2)(a), pursuant which the ICC may exercise its jurisdiction if the state on the territory of which the conduct took place is a party to the Rome Statute.³⁸⁵

The Prosecutor's request is extraordinary on two accounts. Firstly, the request asks for the court to interpret the content of Article 12(2)(a) so that its 'traditional' territorial principle is broadened as 'partly territorial' and secondly, it seems to be the first time that the Prosecutor has sought for a ruling under Article 19(3).³⁸⁶ However, it should be noted the Prosecutor did not go further, the Request did not refer to any other crimes committed in Myanmar.

It is not surprising that following the Prosecution's Request, the government of Myanmar declined to engage with the ICC through any formal means. In its press release Myanmar held that the actions of the Prosecution were an attempt to circumvent the spirit of Article 43 of the VCLT³⁸⁷, evasion of the need for further investigations and lack of respect of Myanmar's sovereignty and territorial integrity and pursuit jurisdiction at the cost of setting a dangerous precedent for non-party states being litigated in the future.³⁸⁸

The Myanmar government also appealed to the bilateral agreement between itself and Bangladesh for the repatriation of the Rohingya and to the Memorandum of Understanding with UNDP and UNHCR for the coordinating and harmonizing humanitarian and development action in Rakhine State in order to guarantee the voluntary, safe and dignified return of the displaced Rohingya who have been duly verified as residents of Myanmar.³⁸⁹ The latter argument sounds hardly convincing as there are no guarantees existing for safe repatriation as at the date hereof.³⁹⁰

The Pre-Trial Chamber of the ICC examined the Prosecution's Request and established in its decision on 6 September 2018 that deportation initiated in a state not party to the Rome Statute (through expulsion or other coercive acts) and completed in a state party to the Rome

³⁸⁴ Request ICC-RoC46(3)-01/18-1, para. 2. Bangladesh has ratified the Rome Statute on 23 March 2010.

³⁸⁵ Request ICC-RoC46(3)-01/18-1

³⁸⁶ Vagias 2018, p. 981.

³⁸⁷ Article 43 of the VCLT states that no treaty can be imposed on a state which has not ratified it. As the Pre-Trial Chamber emphasized in its decision, Article 43 of the VCLT has exceptions deriving from, for example, customary law and *ius cogens* regime. See more Decision ICC-RoC46(3)-07/18-1, paras. 35-36 and the respective footnotes therein.

³⁸⁸ Press Release of the Republic of Myanmar 2018, paras. 3 and 4.

³⁸⁹ Press Release of the Republic of Myanmar 2018, paras. 18 and 19.

³⁹⁰ Channel NewsAsia November 2018.

Statute (by the Rohingya crossing the border over Bangladesh) falls in the scope of Article 12(2)(a). Thus, the ICC has a jurisdiction over the alleged crime, provided that such allegations are proven to the required threshold.³⁹¹ On that basis, the Prosecutor started the investigations on the matter that are pending as at the date hereof.

The Pre-Trial Chamber did not, however, stop its considerations over jurisdiction there. It also took a stand that the ICC's rationale behind the determination of jurisdiction in relation to the crime of deportation may also apply to other crimes within the jurisdiction of the ICC as well. If it was established that at least an element of another crime (or part of it) within the jurisdiction is committed on the territory of a state that is a party to the Rome Statute, the ICC might lay claim of jurisdiction pursuant to Article 12(2)(a) of the Rome Statute.³⁹² The Pre-Trial Chamber used persecution in the meaning of Article 7(1)(h)³⁹³ of the Rome Statute as an example: if it was established to the applicable threshold that the deportation of the Rohingya people took place on any grounds enumerated in Article 7(1)(h), the ICC might have jurisdiction over persecution as crime against humanity pursuant to Article 12(2)(a), considering that the element of crime of deportation (crossing border) took place in a state party (Bangladesh).³⁹⁴

Even though the Prosecutor's Request and the subsequent Pre-Trial Chamber's decision has been welcomed for many reasons, there has also been issues that might cause divergent reactions. The Fact-Finding Mission stated in its Report that danger of possible ruling on the basis of the Prosecutor's Request is that it leads to partial accountability and leaves other crimes unpunished. That would be unbeneficial to many Rohingya victims.³⁹⁵ Further, while affirming the jurisdiction over international crimes occurring partly within the state party territory, the affected non-party states, such as Myanmar, will not most certainly contribute to or cooperate in the investigations that follow. Moreover, broadening the scope too much by suggesting that under certain circumstances the Rome Statute may have effects on states that are not party to the Statute, may, in the worst case, lead to unratifications of the Statute. This would not be contributive to the prevention of future genocides.

³⁹¹ ICC-RoC46(3)-01/18-37, para. 73. See paras. 50-72 for detailed arguments.

³⁹² ICC-RoC46(3)-01/18-37, para. 74.

³⁹³ Article 7(1)(h) entails the following: "*Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court*".

³⁹⁴ ICC-RoC46(3)-01/18-37, para. 76.

³⁹⁵ A/HRC/39/CRP.2, para. 1652.

6.6 Invoking state responsibility

6.6.1 Relationship with individual criminal liability

Even though genocide is understood as a crime, which cannot be executed without involvement of a state, individuals have been found guilty for genocide by the international tribunals despite of the state has not been held responsible for the crime. Since the creation of the ICTY and the ICTR by the UN Security Council, much of the developments of international criminal law dealt with individual liability, and not state responsibility.³⁹⁶ A lot of hope was therefore vested in the ICJ's judgement of 2007, where the court ruled that the Genocide Convention includes, even though it is not expressly stated, an obligation of a state not to commit genocide. The ICJ based its arguments to the interpretation of Article I of the Genocide Convention and to the undertaking "to prevent and punish" genocide. According to the court, the undertaking was not to be read as a mere introduction but as a distinct obligation. Therefore, the court came into conclusion that the obligation to prevent implies also the obligation not to commit genocide and in addition to the individual criminal liability, the Genocide Convention also implies state responsibility. This means that both states and individuals may have simultaneous responsibility for the breach of their obligations under international law.³⁹⁷

State responsibility is not unfamiliar issue *per se* as regards to the Genocide Convention. The history of the state responsibility relates to the formation of the UN and appears also in the coeval preparatory works of the Genocide Convention. In the drafting phase of the Genocide Convention there were few states that were supported the view of the United Kingdom that state responsibility should be included in the Convention. However, that view was defeated by a thin majority, more due to its formulation than the very existence of it.³⁹⁸

Although the individual liability and state responsibility are co-existing and complementary, they do not assume each other.³⁹⁹ The laws of state responsibility and criminal law differs also in their legal consequences. As criminal individual liability aims for punishment,

³⁹⁶ Understandably this is because the ICTY and the ICTR only deal with individual liability.

³⁹⁷ Genocide Case (Judgement of 26 February 2007), para. 13.

³⁹⁸ Aquilina & Mulaj 2018, p. 126.

³⁹⁹ Genocide Case (Judgement of 26 February 2007), para. 13. The court stated that there is room for both in the field of international criminal law.

deterrence and prevention, state responsibility aims to remedy and repair situation so that it conforms with international law.⁴⁰⁰

6.6.2 The concept of state responsibility

The ILC codification project of the law on state responsibility culminated in the 2001 ARSIWA. The essential premise of the ARSIWA, the concept of state responsibility itself, is entailed in Article 1, which provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State.” The commentary of the ARSIWA reveals that whether there has been an internationally wrongful act, depends on the requirements of the obligation which is breached, whether that obligation raises from a treaty, a custom or a peremptory norm or a combination of those, and the framework conditions for such act.⁴⁰¹ Further, the act or omission must be attributable to the state.⁴⁰² It is therefore the rules of attribution that may arise the question of state responsibility. If requirements for attribution are fulfilled, then we have a situation where individual and state responsibility are concurrent.⁴⁰³

The question of state responsibility as regards for international crimes was controversial during the codification process of the ARSIWA. Article 19 of the draft articles that preceded the ARSIWA included specifically a concept of international crimes of states. The Article was, however, abandoned.⁴⁰⁴ Therefore, the nature of state responsibility, as is known today, is not criminal but civil, deriving from the customary rules of attribution.⁴⁰⁵ Although genocide as a crime against *ius cogens* entails an aggravated regime of state responsibility according to Articles 40 and 41 of the ARSIWA, the said Articles seem to target more the obligations of third states in responding to a breach. Milanović further argues that Articles 40 and 41 are not a terminological substitute for state criminality but “*a fundamental rejection of the notion of a different kind of responsibility of states, whose legal nature remains the same even if the norms violated form the very firmament of the international legal order.*”⁴⁰⁶ This means that the status of *ius cogens* and *erga omnes* does not serve much

⁴⁰⁰ Werle & Jessberger 2014, paras. 122-123; Milanović 2006, p. 561.

⁴⁰¹ ARSIWA, Article 1, Commentary.

⁴⁰² ARSIWA, Article 2.

⁴⁰³ Milanović 2006, p. 563.

⁴⁰⁴ See more, Crawford 2013, p. 61. Milanović 2006, p. 563.

⁴⁰⁵ Milanović 2006, p. 564.

⁴⁰⁶ Milanović 2006, p. 563.

more to the scope of state responsibility. All it can bring to the table, is a basis to take collective action to halt such breach.⁴⁰⁷

As regards to state responsibility, there are two separate issues. Firstly, whether the state has breached its obligations to prevent genocide and secondly, whether the state itself has committed genocide. When examining the latter, the rules of attribution, as they are described in the ARSIWA and clarified by the international tribunals, apply. This is due to the fact that a state can be responsible for genocide, even though it cannot commit genocide as such. The ultimate perpetrator is always the individual. The basis to the state responsibility is the attribution of the act of the individual to the state.⁴⁰⁸

6.7 International Court of Justice

6.7.1 Jurisdiction of the ICJ as regards to genocide

The ICJ is the principal judicial organ of the UN⁴⁰⁹ and was established in 1945. The basis for the jurisdiction of the ICJ can be found from Article 36 of its Statute, which states that the jurisdiction of the court comprises all cases which the parties refer it and all matters specially provided in the UN Charter or in the treaties and conventions in force. In addition, the compulsory jurisdiction is provided in Article 36(2) of the Statute. What is noteworthy, the ICJ cannot impose criminal sanctions to individuals.

Genocide is unique crime also in the sense that Article IX of the Genocide Convention explicitly confers to the ICJ the jurisdiction to adjudicate the

*“[d]isputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”*⁴¹⁰

⁴⁰⁷ Milanović 2006, p. 563.

⁴⁰⁸ For a very comprehensive and detailed overview on attribution both for *de jure* and non-state actors, see Milanović 2006, pp. 559-582.

⁴⁰⁹ UN Charter, Article 92.

⁴¹⁰ Genocide Convention, Article IX.

The Article can be considered as special modality for the UN to act, in the meaning of Article VIII of the Genocide Convention, for the prevention and suppression of acts of genocide. Further, because of the involvement of the ICJ, it can be considered as enhancing the prospects to enforce effectively the provisions of the Genocide Convention or at least, raising awareness of the breaches of the Convention.⁴¹¹

What are the implications of Article IX then? Firstly, as can be seen from the wording of the Article IX, its nature is not mandatory as it suggests that cases shall be submitted to the ICJ “at the request” by any of the contracting parties. This means that the ICJ does not investigate matters *proprio motu*.⁴¹² In general, the aim of these kind of compromissory clauses have been to strengthen the treaty by providing a guarantee for its proper application and to promote the rule of law.⁴¹³ However, as regards to the Genocide Convention, settlement of a dispute is hardly imposed and guaranteed, if it only guarantees a possible forum to the settlement. Therefore, on one hand, the jurisdiction of the ICJ is secondary in the sense, that the contracting party is entitled, but not obliged, to invoke it. On the other hand, the Article IX grants the court the mandatory jurisdiction to which all state parties to the Genocide Convention are subjected, but only if the state parties have not inserted reservations to the application of the Article.⁴¹⁴

Secondly, although there are five primary sources of international law⁴¹⁵ by which the ICJ decides the disputes submitted to it, the Article IX of the Genocide Convention refers to only one of them – the convention itself. Therefore, the ICJ, when the case is submitted to it by the said Article, has jurisdiction limited only to decide disputes between the contracting parties relating to the interpretation, application and fulfillment of the Genocide Convention, and of that only.⁴¹⁶

Thirdly, the court’s jurisdiction under the Genocide Convention does not allow trials for state responsibility in any other crime than genocide. This means that crimes that do not amount to genocide but are still mass atrocities in the meaning of crimes against humanity

⁴¹¹ Tams 2014, p. 294.

⁴¹² Tams states that this is a exception to the principle of consensual jurisdiction, as cases can be brought before the ICJ unilaterally under Article IX of the Genocide Convention. See Tams 2014, p. 310.

⁴¹³ Kolb 2009, p. 413.

⁴¹⁴ Kolb 2009, pp. 416-417.

⁴¹⁵ Article 38 of the ICJ Statute. The said article refers to international conventions, customary international law, general principles of law and judicial decisions and teachings of the most highly qualified publicists of various nations.

⁴¹⁶ Aquilina and Mujali also raises the fact that the Article 38 of the ICJ Statute does not imply any hierarchy between the primary sources of international law inter se. See Aquilina & Mujali 2018, pp. 133-134.

are left unpunished even though, for example, the killings would be attributable to the state, but the special intent could not be proved to the necessary level. This is also applicable to *jus cogens* norms, which have an *erga omnes* dimension.⁴¹⁷ In this way, the justice for the victims of crimes, that are of “lesser” nature than genocide, is not done.

6.7.2 Possible jurisdiction of the ICJ in the Rohingya case

As it can be concluded from Article IX of the Genocide Convention, the jurisdiction of the ICJ to hear disputes under Article IX of the Genocide Convention is limited to the parties that have ratified the Genocide Convention. Also, the state parties must have ratified or acceded to the ICJ Statute pursuant to Article 35(1) of the ICJ Statute. Against these requirements, Myanmar has ratified the Genocide Convention on 14 March 1956⁴¹⁸ and it has been a party to the ICJ Statute since 19 April 1948⁴¹⁹.

For the jurisdictional path to open to the ICJ, the relevant question is, whether the state has made reservations to Article IX of the Genocide Convention, which play a role in the possible proceedings. Tams brings up two reasons for reservations. Firstly, states that are concerned of being judicially scrutinized have seen fit to add reservations to Article IX to exclude the competence and jurisdiction of the ICJ. Secondly, it relates to the clarification by the ICJ that the Genocide Convention invokes also state responsibility in addition that of individual.⁴²⁰

The status of the reservations to Article IX of the Genocide Convention is quite strong. In the Advisory Opinion in 1951 the ICJ stated that the reservations to the Genocide Convention are permissible, unless they are not in contrary to the object and purpose of the Convention.⁴²¹ In the judgement concerning Congo and Rwanda, the ICJ further held that the reservation⁴²² made by Rwanda to Article IX, submitted at the time of its accession to

⁴¹⁷ Genocide case (Judgement of 26 February 2007), para. 147. The court stated that it has “no power to rule on alleged breaches of other obligations [...], even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*”.

⁴¹⁸ See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en.

Last visited: 18 December 2018.

⁴¹⁹ See <https://www.icj-cij.org/en/states-entitled-to-appear>. Last visited: 18 December 2018.

⁴²⁰ Tams 2014, pp. 295-296.

⁴²¹ Advisory Opinion, Reservations to Genocide Convention (28 May 1951), para. 22

⁴²² The reservation read as follows: “*The Rwandese Republic does not consider itself as bound by article IX of the Convention*”. Rwanda has withdrawn the reservation in 2008. See https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en. Last visited: 18 December 2018.

the Genocide Convention, was valid.⁴²³ In the case, the court recalled the *East Timor* case, wherein it held that *erga omnes* characterization and the rule of consent to jurisdiction are two different things and that the court cannot assume jurisdiction merely by *erga omnes*.⁴²⁴ The validity of Article IX of the Genocide Convention therefore deals only with the jurisdiction of the ICJ, which is to begin with subject to the consent of the parties.⁴²⁵ That is why jurisdiction of the ICJ is still needed when a state claims jurisdiction based on an *erga omnes* obligation.

To turn the focus to the current crisis concerning the Rohingya, as at the date Myanmar has not made any reservations to Article IX of the Genocide Convention⁴²⁶. Therefore, the jurisdictional path is open for the ICJ. The relevant question is who would bring a case against Myanmar and invoke its state responsibility?

Even though it has been discovered above that Article IX of the Genocide Convention requires always the jurisdiction of the ICJ, the *erga omnes* status, has however some relevance. Since Article IX of the Genocide Convention permits any contracting state to bring case against another party of the Genocide Convention, this would apply also to states that are not directly affected by the genocidal acts. Therefore, they are entitled to seize the court and the ICJ would thus have *locus standi* on the matter.⁴²⁷ This would mean, in principle, that any contracting party to the Genocide Convention could bring the case before the ICJ after establishing a dispute concerning Myanmar's state responsibility and claim for cessation of the wrongful act, provisional measures and reparation for the victims.⁴²⁸

Surprisingly, taken into consideration of the nature of the Rohingya crisis, the question of state responsibility has not been brought up by the international community. The debates and conversations have been focusing on bringing the main military officers before the ICC. Not even the Report of the Fact-Finding Mission suggested state responsibility of

⁴²³ Case Concerning Armed Activities (3 February 2006), para. 67.

⁴²⁴ Case Concerning Armed Activities (3 February 2006), para 64, see also *East Timor Case* (30 June 1995), para. 29.

⁴²⁵ Milanović 2006, pp. 567-568.

⁴²⁶ Myanmar has, however, made reservations to Articles VI and VIII of the Genocide Convention. These do not have effect on Article IX of the Genocide Convention being applicable. See reservations from here: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en. Last visited 18 December 2018.

⁴²⁷ Wouters & Verhoeven 2005, p. 410. This situation applies also to the non-party states, which have accepted the compulsory jurisdiction of the ICJ. See also Kolb & Krähenmann 2009, pp. 428-429.

⁴²⁸ Milanović 2006, p. 563.

Myanmar.⁴²⁹ State responsibility was not considered until Michael Becker examined in his recent post the Rohingya crisis and the possible parties that could be held responsible for the events.⁴³⁰

In the view of Becker, the of the most potential state to bring such a case before the ICJ might be Myanmar's neighboring country, Bangladesh. Bangladesh has indeed been affected by the Rohingya crisis by the massive number of refugees that have fled to the country. However, so far Bangladesh has been quite silent on the matter, although it did submit its observations to the Prosecutor's Request⁴³¹, it has not initiated any proceedings or referred the situation to the ICC pursuant to Article 12(a) of the Rome Statute. Further, as regards to the jurisdiction of the ICJ, the reservation made to Article IX of the Genocide Convention by Bangladesh seems problematic. The reservation declares that "[f]or the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute will be required in each case."⁴³² This would imply that also the consent of Myanmar would be required, which most likely would not be received in this case.

Even if there is a possibility for any contracting state to the Genocide Convention to bring a case against Myanmar to the ICJ, it does not mean that states would be willing to do so. As Becker points out, proceeding to the ICJ might have both political and economic consequences and assumedly that would affect to the number of states who would be up to such case. However, should such case be brought to the ICJ, it would compel Myanmar to respond to the allegations and facts represented by the Fact-Finding Mission in its Report. Moreover, it could lead to ordering of provisional measures that might help the safe repatriation of the Rohingya to Myanmar and raise questions of reparations.⁴³³

Considering the pros and cons of proceeding to the ICJ, one issue that should be carefully considered is, how would a possible negative finding of genocide affect to the situation? To compare, in the *Genocide* case the ICJ leaned heavily in the findings of the ICTY, this might

⁴²⁹ A/HRC/39/CRP.2, paras. 1623 *et seq.* State responsibility is not mentioned therein in the steps "way forward".

⁴³⁰ EJIL: *Talk!* 2018.

⁴³¹ Decision ICC-RoC46(3)-01/18-1, para. 18.

⁴³² See

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=en#EndDec.

Last visited: 18 December 2018.

⁴³³ EJIL: *Talk!* 2018.

correspondingly give leverage to Myanmar, should its military officials face charges in the ICC after the ICJ having found that no genocide has taken place in Myanmar.

7 CONCLUSIONS

“Prevention means acting early...Together with a commitment to accountability, we owe this to the millions of victims of the horrific international crimes of the past – and those whose lives we may be able to save in the future.”⁴³⁴

The Rohingya crisis, starting from as early as 1978 (if not earlier), seems to boil down to inactivity of the international community to halt and stop the behavior against the norms of international law. Passing on a Constitution, that denies the citizenship from the Rohingya, and the persecution that followed should have led to more action on the part of the international community as it did. Solving problems through diplomatic means is a good and well-justified start, but the recurrent disregard of the international norms and obligations and non-cooperation by Myanmar government should cause more than shrug of shoulders.

Although the Genocide Convention has marked an important development in international criminal law, it has left room for interpretations. In that task the international tribunals have been of great importance. The subsequent case law of the tribunals has mitigated the shortcomings of the Genocide Convention and continues to do so. Therefore, for the states and their governments, it should not be unclear what the legal elements of the crime of genocide are to invoke it.

International community must have impartial tools to recognize the facts of the crises, so that we can separate crime of genocide from other mass atrocities. As regards to the Rohingya case, if not other cases as well, the Report of the Fact-Finding Mission has appeared to be critical in the reactions of the international community. After the release of the Report, the Rohingya crisis has been named genocide more often and the ICC’s Prosecutor filed her Request basing to the Report. One suggestion would be that fact-finding missions would be engaged earlier, subject to certain triggers.

Genocide has a well-established status of being a “crime of crime”, which is further supported by its nature of *ius cogens* and *erga omnes*. Unfortunately, this status does not

⁴³⁴ Stated by the Secretary-General Ban Ki-moon, Framework of Analysis 2014, p. 33.

come across in the reactions of the international community to the Rohingya crisis. The international community may avoid the use of the term “genocide” for the fear of the obligations that may follow. Another reason may be that the obligation to prevent is somewhat vaguely defined, and the concrete measures to be taken by the states are unclear. However, naming genocide as ethnic cleansing, or naming a situation as genocide too late, is unbearable for the victims. Ultimately, they are the ones that bear the consequences.

It is true that when looking at the wording of the Genocide Convention and its Articles, the obligation to punish stands out compared to obligation to prevent. However, as it has been stated by the ICJ, the obligation to prevent has an independent nature. The power of prevention must be understood correctly, it is less costly but also, above all, less politically charged alternative to stop genocide. Even though the Genocide Convention, or the ICJ judgement for that matter, left open, what are the concrete means to prevent, the international community should, however, recognize that it is the task of all states to prevent genocide and recall that genocide is a threat to international peace, not a domestic matter. Recognizing early warning signs is a good start to prevent genocide but as it can be concluded from the Rohingya crisis, the warning signs also need to trigger action. Further, in case potential genocidal actors have been recognized, they should also be supervised more closely.

As regards to large-scale crises, the debate on state sovereignty and its relationships to interventions has been dominant. Therefore, it is no wonder that R2P was welcomed as a needed tool for prevention populations from mass atrocities, such as genocide. However, in terms of use of force, whether by military interventions or other coercive measures, the preventive aspect of R2P is prioritized over those. This means that the preventive measures should be exhausted before proceeding to more coercive ones.

As it has been acknowledged, early prevention of mass atrocities is of great importance. However, when the crisis has already escalated into mass atrocity, the preventive measures offer very little help to the situation. Moreover, not exhausting all the preventive measures could serve strong argument for the territorial state to avoid the collective intervention to the situation. In addition, also in the case of RP2, there is also the veto powers of UN Security Council to tackle. What should be remembered is, in the context of the R2P, that the distinction of genocide from the other crimes is not that relevant in the field of peace of security. Any of the crimes, whether genocide, ethnic cleansing or crimes against humanity,

can constitute a threat to peace and trigger the R2P. Therefore, what might serve good to the situation to the Rohingya is that, the R2P applies to ethnic cleansing also.

Punishment as a mean of prevention has its place as regards to future mass atrocities. As it happens in the aftermath, its benefits are not that concrete. Nothing will bring back the lost lives. However, this does not mean that the punishment should not be used at all. The international law enables the dual track for the punishment of perpetrators, both individual and state. The problems relating to punishment is not, however, the lack of possible avenues to trials but the lack of ratifications of the conventions and statutes and the imposition of reservations that hinder the effective punishment. Therefore, the international community should aim for the ratifications of the Rome Statute and withdrawal of reservations from the Genocide Convention.

As regards to the Rohingya crisis, the Prosecutor's Request to the ICC has been a welcomed reaction in otherwise silent climate. The danger of this rather unconventional means to pursuit jurisdiction is that it will startle the international community to consider such development as weakening their position or state sovereignty. Therefore, the referral by the UN Security Council would be the most feasible one. It is noted that Fact-Finding Mission also brought up the idea of setting up an ad hoc tribunal for Myanmar – however, in this time frame that requires to solve the Rohingya crisis promptly, it would be too time consuming and would also need the contribution of the UN Security Council.

To sum, prevention and observing the early warning signs is the right issue to concentrate on, but when they fail, there should be an effective and prompt way to react in operational level. Thresholds and limitations to the use force are obviously needed, but time-wise, when the genocide is already taking place, the process may be too slow. Surely, the language, goals and rationale of the Framework Analysis relating to prevention and R2P are easy to follow and understand, and they have verifiably moral appeal. Invoking universal ideas, or endeavors, is a vehicle for global attention to the matter. While lacking normative precision, the proliferation and the reaffirmation of the concept creates impression of changes in the international community and the politics. The world should not, however, be blinded by the mere attention, if nothing changes. The danger is, that the whole concept will lose its meaning by empty promises. The political will of the international community is thus called for.

This Thesis is not suggesting that there is no foot hold for diplomacy and reaffirmations of what has been the will of the international community. However, history of the mass atrocities, such as the one in Rwanda or the current situation Myanmar, shows and proves that the early-warning signs have been there for everyone to see. Missing them is not the reason why genocide happens, rather disregarding and not knowing what to do with them is. If that leads to inactivity and passivity, then the message to the perpetrators is clear – preventing genocide is indeed mission impossible. Doing nothing should not be an option.